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No. _____

In The
Supreme Court of the United States

COUNTY OF BUTTE, ET AL.,
Petitioners,

v.

THE SUPERIOR COURT OF BUTTE COUNTY,
DAVID WILLIAMS, AND DOES 1-4,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Third Appellate District

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, which defines marijuana as contraband per se, preempt the decision from California's Third District Court of Appeal, which held that California law provides a protected property interest in marijuana that can form the basis for a civil action against law enforcement officers for money damages?

PARTIES TO THE PROCEEDING

The Petitioners are the County of Butte, California, the Butte County Sheriff's Department, and Butte County Sheriff's Deputy Jacob Hancock. None of the Petitioners is a corporation.

The Respondents are the Superior Court of Butte County, David Williams, and DOES 1-4.

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PETITION FOR WRIT OF CERTIORARI

Petitioners the County of Butte, the Butte County Sheriff's Department, and Butte County Sheriff's Deputy Jacob Hancock (the "County") respectfully petition for a writ of certiorari to review the divided decision of the California Court of Appeal, Third Appellate District.

OPINIONS BELOW

The California Court of Appeal's decision is reported at 175 Cal.App.4th 729, and is reprinted in the Appendix to the Petition ("App.") at 2a-32a. The California Supreme Court's denial of the County's Petition for Review of the Court of Appeal's decision is available electronically at 2009 Cal. LEXIS 10302 (Cal. September 23, 2009), and appears in the Appendix at 1a. The order of the Butte County Superior Court, overruling the County's demurrer and motion to strike Respondent David Williams' Fourth Amended Complaint, appears in the Appendix at 33a-42a.

JURISDICTION

The Court of Appeal issued its decision on July 1, 2009. The County filed a timely Petition for Review asking the California Supreme Court to review the decision of the Court of Appeal. The California Supreme Court denied the Petition for Review by a vote of 4-2 on September 23, 2009.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Court of Appeal affirmed the trial court's overruling of the County's demurrer on the basis that California law provides a right to

manufacture, distribute, and possess marijuana – a controlled substance that the federal government is seeking to eradicate. The Court of Appeal's decision was published, and now applies to every law enforcement officer and agency in the State of California. The decision was "final" within the meaning of 28 U.S.C. § 1257(a) because the Appellate Court finally determined that the creation of a protected property interest in marijuana would not violate the Supremacy Clause of the United States Constitution. Reversal by this Court would preclude any further proceedings, whereas allowing the decision to go unchallenged would seriously erode important federal policy in the area of controlled substances, and violate the United States' obligations under an international treaty. *Cox Broad. Corp. v. Cohn,* 420 U.S. 469, 486 (1975); *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 178-180 (1988); *Mississippi Power & Light Co. v. Mississippi Ex Rel. Moore, Attorney General of Mississippi,* 487 U.S. 354, 369, n.10 (1988).

CONSTITUTIONAL PROVISION INVOLVED

The Supremacy Clause of the United States Constitution, Article VI, Clause 2 provides as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

1. In 1970, Congress passed the Controlled Substances Act (the "CSA"), 21 U.S.C. § 801 *et seq.*, in part to comply with the United States' obligations under an international treaty called the UN Single Convention on Narcotic Drugs (the "Single Convention"). 21 U.S.C. § 801(7); *National Org. for Reform of Marijuana Laws (NORML) v. DEA*, 559 F.2d 735, 737 n. 2 (D.C. Cir. 1977) ("*NORML*"). The main objectives of the CSA are to conquer drug abuse, control the legitimate and illegitimate traffic in controlled substances, and prevent the diversion of drugs from legitimate to illicit channels. 21 U.S.C. §§ 801(1)-(6); *Gonzales v. Raich*, 545 U.S. 1, 12-13, nn. 20-21 (2005). To effectuate its purposes, the CSA is a comprehensive and closed regulatory regime that makes it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a); *Raich* at 13.

The CSA categorizes all controlled substances into one of five "schedules." 21 U.S.C. § 812. "Schedule I" substances have a "high potential for abuse," "no currently accepted medical use in treatment in the United States," and a lack of accepted "safety for use of the drug or substance under medical supervision." 21 U.S.C. § 812(b)(1)(A)-(C). At the time the CSA was enacted, Congress designated marijuana as a Schedule I drug. 21 U.S.C. § 812(c).

The CSA and its implementing regulations set forth strict requirements that are designed to control the manufacture, distribution, and use of controlled substances in each of the five schedules. *Raich* at 12-

13. Schedule I substances like marijuana are highly regulated; the manufacture, distribution, or possession of marijuana is a criminal offense, and no physician may prescribe or dispense marijuana to any patient outside of a strictly controlled research project. 21 U.S.C. §§ 823(f), 841(a); see also *United States v. Oakland Cannabis Buyers' Cooperative*, 523 U.S. 483, 490 (2001).

Although Schedule II drugs also have a high potential for abuse, drugs that are classified in Schedules II through V do have a currently accepted medical use, and are allowed to be prescribed by physicians for therapeutic purposes. 21 U.S.C. § 812(b)(2). However, the CSA requires manufacturers, physicians, pharmacies, and other legitimate handlers of such drugs to comply with stringent statutory and regulatory provisions. 21 U.S.C. §§ 821-839; 21 C.F.R. Pts 1301-1306.

The CSA provides for the periodic updating of schedules, and delegates authority to the Attorney General to add, remove, or transfer substances to, from, or between schedules. 21 U.S.C. § 811. Congress's classification of marijuana as a Schedule I drug has been repeatedly challenged, but those challenges have all been rejected. *Raich*, 545 U.S. at 14-15, n. 23. Furthermore, in accordance with the United States' obligations under the Single Convention, marijuana can only be reclassified to a Schedule II drug. *NORML, supra*, 559 F.2d at 750-51, n. 68.

2. a. In November of 1996 California voters approved Proposition 215, known as the Compassionate Use Act of 1996 (the "CUA"). The CUA

did not provide a means for individuals to obtain marijuana. *People v. Mentch*, 45 Cal.4th 274, 286 (2008). Instead, it simply provided a potential defense to seriously ill individuals and their caregivers, who cultivated their own marijuana, or obtained it from the illicit market, if they could prove that the possession or cultivation was for personal use and pursuant to a physician's recommendation. Cal. Health & Saf. Code § 11362.5. The official ballot pamphlet informed voters that "[p]olice officers can still arrest anyone for marijuana offenses. Proposition 215 simply gives those arrested a defense in court, *if they can prove they used marijuana with a doctor's approval.*" *Ross v. Ragingwire Telecomms., Inc.*, 42 Cal.4th 920, 929 (2008) (Emphasis in the original.)

b. In 2003 the California Legislature enacted the Medical Marijuana Program (the "MMP") to "clarify" the CUA. Cal. Health & Saf. Code § 11362.7-11362.83; *People v. Urcizeanu*, 132 Cal.App.4th 747, 783 (2005). The MMP established a voluntary identification card program whereby individuals could apply for a card that would identify the bearer as someone who uses or possesses marijuana for medical purposes. Cal. Health & Saf. Code §§ 11362.71, 11362.72.

To promote the consistent application of the CUA among the counties within California, the MMP established threshold amounts of marijuana that can be possessed and cultivated; eight ounces of dried marijuana, and either six mature or twelve immature plants. Cal. Health & Saf. Code § 11362.77(a). However, doctors can recommend any amount, Cal. Health & Saf. Code § 11362.77(b), and cities and

counties have full discretion to increase those amounts as well. Cal. Health & Saf. Code § 11362.77(c)[1].

In an effort to "enhance access" to marijuana, the MMP encouraged the collective cultivation of marijuana by providing individuals who do so with an exemption to several additional criminal charges, including the possession of marijuana for sale, transporting or furnishing marijuana, and maintaining a location for unlawfully selling, giving away, or using controlled substances. *Cal. Health & Saf. Code* § 11362.775; *People v. Urcizeanu*, 132 Cal.App.4th at 783.

c. The California Supreme Court has repeatedly confirmed that California law does not, and cannot, provide a right to marijuana, but only a defense to criminal charges. See *People v. Mower*, 28 Cal.4th 457, 473 (2002) (the CUA decriminalizes "conduct that would otherwise be criminal."); *People v. Wright*, 40 Cal.4th 81, 90 (2006) ("The CUA provides a defense for physician-approved possession and cultivation of marijuana."); *People v. Mentch*, 45 Cal.4th 274, 286 (2008) ("The Act is a narrow measure with narrow ends.")

Recently, in *Ross v. Ragingwire*, the Supreme Court rejected the plaintiff's claim that the CUA provided a "right to marijuana" that could support a civil action against his former employer. *Ross, supra*, 42 Cal.4th at

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[1] The California Constitution prohibits the Legislature from amending the CUA. Whether the amounts set forth in Health & Safety Code § 11362.77 are an unconstitutional amendment of the CUA is currently being reviewed by the California Supreme Court in *People v. Kelly*, review granted August 13, 2008, S164830.

926. The Supreme Court explained that no state law "could completely legalize marijuana for medical purposes because the drug remains illegal under federal law, even for medical users." *Id.* (Internal citations omitted.) "Instead of attempting the impossible," California's voters "merely exempted medical users and their primary caregivers from criminal liability under two specifically designated statutes." *Id.*

3. a. In September of 2005, Butte County Sheriff's Deputy Jacob Hancock investigated 41 marijuana plants growing outdoors on property owned by Respondent David Williams (herein "Williams"). App. 6a. Williams provided Deputy Hancock with seven physician's recommendations, and contended that he was cultivating the plants as part of a "lawful collective." App. 6a.

Deputy Hancock's investigation revealed that Williams was not cultivating the marijuana as part of a collective, but rather than arrest Williams and seize all of the marijuana, he gave Williams the option of removing 29 of the 41 plants. App. 6a. Williams agreed to do so, and based on that decision he was not arrested, and criminal charges were never filed. App. 6a.

Williams then filed suit against Deputy Hancock in civil court. App. 6a. The complaint alleges that Deputy Hancock violated Williams' "constitutional, statutory, and common law" rights to possess, cultivate, and distribute marijuana, and contains five separate causes of action – including a claim for the tortious conversion of his marijuana plants. App. 6a.

The complaint seeks compensatory damages for the 29 plants that Williams destroyed. App. 6a.

The County filed a demurrer to every cause of action on the basis that California law did not provide Williams with a property interest in marijuana, but only a potential defense to criminal charges. App. 6a-7a. The County argued that allowing Williams' lawsuit to proceed would improperly convert the limited defense approved by voters into an affirmative right. App. 7a. In addition, the County filed a motion to strike Williams' request for money damages. App. 7a.

The trial court overruled the County's demurrer by reasoning that "if plaintiff could show that he had a legal right to possess the marijuana in question, and that his rights were violated, he may bring his action based on generally applicable legal principles." App. 7a-8a. The trial court overruled the County's motion to strike as well. App. 9a.

b. The County then filed a petition for a writ of mandate in California's Third District Court of Appeal[2]. In an unprecedented decision, a divided panel of the Court of Appeal concluded that California law provides a protected property interest in marijuana, and that Williams' due process, conversion, and related causes of action could therefore proceed. The County filed a timely Petition for Review with the

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[2] In its writ petition, the County did not argue that the trial court's ruling was preempted by federal law, but only that it was inconsistent with California law. However, the federal preemption issue was fully briefed by counsel for amici curiae, App. 43a-74a, and discussed at length in the dissenting opinion.

California Supreme Court, which was denied by a 4-2 vote on September 23, 2009. App. 1a.

The Court of Appeal did not cite to any language in the CUA or MMP to support its creation of a protected property interest in marijuana, but relied entirely on "considerations of due process and fundamental fairness" that were first espoused by California's Fourth District Court of Appeals in *City of Garden Grove v. Superior Court* 157 Cal.App.4th 355 (2007) (*"Garden Grove"*).[3] App. 11a.

In *Garden Grove,* the Real Party in Interest, Felix Kha, was charged with possessing less than one ounce of marijuana while driving. *Garden Grove, supra*, 157 Cal. App. 4th. at 363. In the criminal proceedings, Mr. Kha presented the prosecutor with a physician's recommendation for his use of marijuana; and after the prosecutor was able to confirm that the recommendation was valid, and that the amount of marijuana Mr. Kha possessed was consistent with his recommendation, he agreed to dismiss the charge. *Id.* Mr. Kha then petitioned the criminal court for the return of his marijuana, and the trial court ordered its return. *Id.*

In affirming the trial court's order, *Garden Grove* interpreted the California Supreme Court's statement in *People v. Mower*, 28 Cal.4th 457, 482 (2002) – that the CUA "renders possession and cultivation of

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[3] The City of Garden Grove's petition for a writ of certiorari, Docket No. 07-1569, was denied on December 1, 2008. See *City of Garden Grove v. Superior Court of California*, 2008 U.S. LEXIS 8568 (U.S., Dec. 1, 2008).

marijuana noncriminal for a qualified patient or primary caregiver" – to mean that the possession and cultivation of marijuana is "lawful" under the terms and conditions set forth in the CUA. *Id.* at 389. Based on that "translation," *Garden Grove* reasoned that because the criminal court had determined that Mr. Kha was in "lawful" possession of his marijuana, "considerations of due process and fundamental fairness" provided him with a "right" to have it returned. *Id.* at 388-89.

Although the allegations in Williams' civil complaint were significantly different than the facts adjudicated by the criminal court in *Garden Grove*, the Court of Appeal relied on the same "considerations of due process and fundamental fairness" to reach the unprecedented conclusion that California law provides a protected property interest in marijuana that can form the basis for a civil action against law enforcement officers for money damages. App. 11a.

c. Judge Morrison dissented. App. 17a-32a. He recognized that "[i]n this case the CUA is not raised as a shield against criminal charges; it is used as a sword in an attempt to impose civil liability against a peace officer." App. 19a. Judge Morrison disagreed with the majority's reliance on *Garden Grove* because in his view *Garden Grove* was erroneously decided. App. 20a-21a. ("The point where *Garden Grove* goes astray is when it pronounces the possession of marijuana under the CUA was 'legal under state law, but illegal under federal law.' The marijuana was not 'legal' under state law, because California cannot make 'legal' that which Congress makes illegal.")

Judge Morrison determined that *Garden Grove's* mistake on that fundamental issue was based on its mischaracterization of the California Supreme Court's decision in *Mower*:

> The California Supreme Court instead said 'the possession and cultivation of marijuana [under the CUA] *is no more criminal* – so long as its conditions are satisfied – than the possession and acquisition of any prescription drug with a physician's prescription. *Garden Grove* used 'lawful' as a synonym for noncriminal, but there is a difference. That difference was confirmed by the California Supreme Court in *Ross*, holding that the CUA did *not* give 'marijuana the same status as any legal prescription drug.' Instead, 'it merely exempted [persons complying with the CUA] from criminal liability under two specifically designated state statutes.' This mistake by *Garden Grove* influenced its analysis and lead to an erroneous result, authorizing the return of marijuana to a private person, in violation of federal law.

App. 21a (Internal citations omitted). The dissent concluded that "[u]nder the laws of the United States, as interpreted by *Raich*, the *only* effect of the CUA is as its terms state: It provides a defense to California *criminal* charges. It does not make marijuana 'legal' in any sense." App. 19a.

Judge Morrison also disagreed with the Court of Appeal's creation of a property interest in marijuana because the CSA expressly states that "no property right shall exist" in marijuana, and this Court confirmed in *Raich* that all marijuana is contraband

per se, even if it is "grown in the backyards of very ill Californians acting on the advice of their doctors." App. 20a. The dissent cited a legion of cases, spanning over a century, which all confirmed the basic principle that "neither tort liability nor due process rights arise from the seizure or destruction of contraband per se." App. 24a-26a. To get around those cases, and this Court's decision in *Raich*, the Court of Appeal declared that because Deputy Hancock was acting under color of California law, and not federal law, the "numerous federal authorities cited by the dissent" did not apply. App. 17a.

REASONS FOR GRANTING THE PETITION

California's Third District Court of Appeal has held that California law provides a right to manufacture, distribute, and possess marijuana, and that any state law enforcement officer who interferes with those rights can be sued in civil court for money damages. The Court of Appeal's unprecedented decision presents an absolute conflict with the CSA, as interpreted by this Court in *Raich*, and the fundamental principle – universally recognized by all other courts – that individuals cannot have a property right in items that are contraband per se. In addition to an absolute conflict, the Court of Appeal's decision stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and obstructs the United States' ability to satisfy its obligations under the Single Convention as well.

A. THE COURT OF APPEAL ERRED IN DECLARING THAT CALIFORNIA LAW PROVIDES A RIGHT TO MANUFACTURE, DISTRIBUTE AND POSSESS MARIJUANA.

1. The Supremacy Clause of Article VI of the United States Constitution mandates that federal law supercede state law where there is a conflict between such laws. *Gibbons v. Ogden*, 22 U.S. 1, 210 (1824); *Free v. Bland*, 369 U.S. 663, 666 (1962); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). A state law conflicts with a federal law, and is therefore preempted under the Supremacy Clause, if either "it is impossible for a private party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (Internal quotation marks and citations omitted).

The CSA is a comprehensive and closed regulatory regime that makes it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a); *Raich*, 545 U.S. at 13. Since the time the CSA was enacted, marijuana has been classified as a Schedule I drug. *Raich* at 14-15, n. 23. Therefore, the manufacture, distribution, or possession of marijuana is a criminal offense, and no physician may prescribe or dispense marijuana to any patient outside of a strictly controlled research project. 21 U.S.C. §§ 812(c), 823(f), 841(a); see also *United States v. Oakland Cannabis Buyers' Cooperative, supra,* 523 U.S. at 490. The CSA applies to all citizens, including seriously ill Californians who

possess or cultivate marijuana on the advice of a physician. *Raich,* 545 U.S. at 26-27.

California and thirteen other states have enacted laws that exempt individuals who use marijuana for medicinal purposes from penalties under their states' criminal laws. However, the constitutionality of such laws remains in doubt. See, for example, *San Diego County v. San Diego NORML*, 165 Cal.App.4th 798, 827 (2008) ("California's decision to enact statutory exemptions from state criminal prosecution for such persons arguably undermines the goals of or is inconsistent with the CSA....") Nevertheless, the laws enacted in all fourteen states are premised on the idea that although marijuana remains contraband per se under federal law, states can create an exemption to their own criminal laws. See *Ross, supra*, 42 Cal. 4th at 927 ("Although California's voters had no power to change federal law," they were free to "view the possibility of beneficial medical use as a sufficient basis for exempting from criminal liability under state law patients whose physicians recommend the drug.").

In this case, David Williams was never arrested or criminally prosecuted because he agreed to remove 29 of the 41 plants growing on his property. In his civil lawsuit, he claims that he had a right to cultivate all 41 marijuana plants, and that Deputy Hancock violated his rights when he informed Williams that he would be arrested if he did not remove a portion of the plants. App. 19a (Morrison, J., dissenting) ("In this case the CUA is not raised as a shield against criminal charges; it is used as a sword in an attempt to impose civil liability against a peace officer.")

In allowing Williams' lawsuit to proceed, the Court of Appeal concluded that in addition to a defense to criminal charges, California law also provides a protected property interest in marijuana. This unprecedented decision presents an absolute conflict with federal law. The CSA expressly states that "no property right shall exist" in marijuana, 21 U.S.C. § 881(a), and this Court has confirmed that the CSA applies to all marijuana, even if it is cultivated or possessed for medicinal purposes. *Raich* at 26-27. There can be no doubt that a state law that provides individuals with a property interest in a strictly controlled substance that the federal government defines as contraband per se presents an absolute conflict.

a. In a deliberate effort to avoid the application of federal law, the Court of Appeal stated that because Deputy Hancock was operating under color of state law, the CSA and *Raich* did not apply. App. 17a. However, the decision was published, and now applies to every peace officer and law enforcement agency in the State of California. The Court of Appeal's attempt to segregate state and federal law enforcement officers, solely for the purpose of creating a property right to marijuana, is a fundamentally flawed standard.

Like judges, California's peace officers swear to uphold the constitution and laws of California and the United States, and certainly, in exercising their daily duties, California's peace officers must comply with the provisions of both California and federal law. Furthermore – particularly in the area of drug enforcement – state law enforcement officers routinely work with federal law enforcement officers and prosecutors, either formally through joint task forces,

or on an informal basis. See *Raich*, *supra*, 545 U.S. at 7 (Deputies from the Butte County Sheriff's Department and agents from the federal Drug Enforcement Administration came to Monson's home); *People v. Nord*, 377 F.Supp.2d 945 (2005) (Narcotics task force included DEA agents as well as local law enforcement personnel who work full time on the task force); *United States v. Rosenberg* 515 F.2d 190, n. 2 (9th Cir. 1975) (State law enforcement officers who investigated a doctor for unlawfully prescribing controlled substances in violation of the CSA turned their information over to the United States Attorney for prosecution). Therefore, determining an individual's property rights based solely on the employer of a law enforcement officer is offensive to law enforcement, and leads to inconsistent and even whimsical results.

b. The idea of segregating state and federal law enforcement officers, solely for the purpose of determining individuals' "rights" with respect to marijuana, first began in *Garden Grove*, which held that state law enforcement officers are required to return seized marijuana, in violation of the CSA, to individuals determined by California's criminal courts to be acting in compliance with state law. However, *Garden Grove* involved a small amount of processed marijuana that, on a practical basis, was able to be maintained by law enforcement, whereas the vast majority of marijuana that is seized by law enforcement officers is not processed, and uprooted plants quickly lose their value. Furthermore, as was demonstrated in *Garden Grove*, whether an individual can successfully assert a defense to criminal charges is generally established, if at all, well after marijuana is seized.

The Appellate Court's creation of a right to marijuana advances this hypocrisy dramatically further. Individuals who are determined by criminal courts to be in compliance with California law, but in violation of federal law, can not only seek the return of seized marijuana, but they can seek compensation if their seized marijuana plants are damaged or destroyed. Therefore, California's law enforcement officers are required to nurture and tend to seized marijuana plants pending the outcome of criminal and civil trials and appeals, in further violation of the CSA, lest they be sued for money damages. Furthermore, by creating a property interest in marijuana, individuals who are merely *claiming* to be in compliance with California's criminal laws now have the ability to file suit for money damages, regardless of whether criminal charges are filed.

It makes a mockery of federal law if state law enforcement officers – many of whom work jointly with federal law enforcement officers – are required to tend to seized marijuana plants, or compensate individuals who manufacture, distribute, and possess marijuana in violation of federal law. Rather than condone illegal conduct, and attempt to assign a value to contraband per se, every other court who has dealt with this issue has correctly concluded that "neither tort liability nor due process rights arise from the seizure or destruction of contraband per se." App. 24a-26a (Morrison, J., dissenting); *U.S. v. Bagley*, 899 F.2d 707, 708 (8th Cir. 1990) ("[T]o allow [Bagley] to reap the economic benefit from ownership of weapons [] which it is illegal for him to possess would make a mockery of the law.")

2. a. The CUA never intended to place such an impossible and hypocritical burden on California's law

enforcement officers. Prior to the vote on Proposition 215, voters were told that "[p]olice officers can still arrest anyone for marijuana offenses" because the CUA would only provide *individuals* with a defense to charges; it would not create a property interest in the substance itself. *Ross, supra,* 42 Cal.4th at 929. In fact, arrests and prosecutions were the only intended means of ensuring that the extensive amounts of marijuana contemplated by the CUA were truly being used for medicinal purposes.

The Appellate Court's decision is significant because it changes that dynamic. By creating a property interest in marijuana, and imposing liability on law enforcement officers and agencies, it is now the responsibility of law enforcement officers to determine, in the field, and on pain of potential liability, whether marijuana is truly being used, or will be used, for a legitimate medical purpose. In *Raich,* this Court recognized the "impossible" task of attempting to determine whether marijuana is being manufactured or distributed for "medical" purposes, particularly because marijuana is a "fungible" commodity that is "never more than an instant away" from the illicit market. *Raich,* 545 U.S. at 39 (Scalia, J., concurring in the judgment). The Appellate Court's decision makes an "impossible" task even more difficult.

The Petitioners are already aware of three lawsuits that have been filed in the wake of the Appellate Court's ruling, by individuals who have invoked the decision to claim that their rights to manufacture, distribute and possess marijuana have been violated, and that they are entitled to money damages and

injunctive relief[4]. In addition, the Petitioners are aware of several government tort claims – the prerequisite to filing an action against a public agency in California – that have been filed against law enforcement officers and agencies in several other counties[5]. It is very likely that cities throughout California are receiving such claims as well. This increasing litigation – coupled with the threat of money damages, and the impossible task of maintaining seized marijuana plants – has naturally caused many law enforcement officers and agencies to be extremely reluctant to arrest individuals who are believed to be in violation of the law. In short, the Appellate Court's decision has effectively chilled the only real means of controlling the massive amount of marijuana being produced in California, and distributed across state lines as well[6].

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[4] *Parnell et al v. County of Del Norte*, Del Norte County Superior Court Case No. CV UJ 09-1271, filed August 3, 2009; *Stewart v. County of Del Norte*, Del Norte County Superior Court Case No. CV UJ 09-1001, filed August 17, 2009; *Littlefields et al v. County of Humboldt*, Humboldt County Superior Court Case No. DR090888, filed October 6, 2009.

[5] *Claimant Ryan Booker and Ethnobotanica Patients Cooperative v. Santa Cruz County*, filed September 2, 2009, seeking compensatory damages for the seizure of over 1,000 plants; *Claimant Joseph Reiter v. Sonoma County*, amended claim filed July 15, 2009, seeking damages in excess of $10,000 for destroyed marijuana plants; *Claimant Cody Bly Ungles v. Nevada County*, filed November 5, 2009, seeking damages in excess of $15,000 for the destruction of approximately 5 pounds of marijuana.

[6] See L.A. to Crack Down on Marijuana Stores, *New York Times*, October 18, 2009 ("No state has gone further than California, often described by drug-enforcement agents as a 'source nation' because of the vast quantities of marijuana grown here.")

b. The absolute conflict between California and federal law also leads to rulings that violate the "strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transactions." *Heck v. Humphrey*, 512 U.S. 477, 484 (1994). For example, in support of its demurrer to Williams' complaint, the Petitioners requested that the trial court take judicial notice of the case file in *People v. Rasmussen*, which was a criminal case pending at the time in Butte County Superior Court's criminal division.[7] Rasmussen had been arrested in April of 2007 and charged with unlawfully cultivating marijuana. In his defense, he contended that he was cultivating the marijuana as part of a "lawful" collective.

The purpose of the request for judicial notice was to demonstrate to the trial court that if individuals who have been charged with unlawfully possessing or cultivating marijuana are allowed to simultaneously file civil actions, and have civil courts determine in the abstract whether the individuals involved could successfully assert a defense to criminal charges – while the same issues are being decided in criminal courts, under a different standard of proof – then there is a very real risk that inconsistent rulings will result.

Due to the practical realities of law enforcement, the risk of incompatible rulings is by no means limited to California's courts. At the conclusion of

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[7] The docket for *People v. Rasmussen*, Butte County Superior Court Case No. CM026484, is available online at:

http://www.buttecourt.ca.gov/online_index/CMSCaseDisplay.cfm?URLCaseNumber=CM026484

Rasmussen's preliminary hearing in July of 2007, he was held to answer both criminal counts. However, Rasmussen was also being investigated by federal law enforcement officers, and in October of 2007 an indictment was filed in the U.S. District Court for the Eastern District of California *for the exact same marijuana*[8]. The state law charges against Rasmussen were dismissed in the interests of justice, but the federal charges are still pending.

At the time the County filed its demurrer to Williams' complaint, *Rasmussen* was one of numerous cases pending in Butte County's criminal courts that involved the collective cultivation of marijuana. The County chose the *Rasmussen* case at random to demonstrate a simple point. Based on the Appellate Court's decision, and the practical realities of law enforcement, an individual in California can now file suit for money damages against state law enforcement officers who interfere with his right to marijuana, while he is being prosecuted at the federal level, *or subject to future prosecution*, for the exact same activity.

As discussed above, California is now one of fourteen states that have passed laws that allow for the medicinal use of marijuana. However, all fourteen states' laws are premised on the idea that although marijuana remains contraband per se under federal law, states can provide a defense or exemption to their own criminal statutes. California's Third District Court of Appeal has gone dramatically further, and is

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[8] *United States v. Rasmussen*, U.S. District Court for the Eastern District of California, Case No 2:07-cr-00464-JAM-1.

the first court in any of the fourteen states to find that states can also provide a legally protected property interest in marijuana. The decision presents an absolute conflict with federal law. The two systems cannot consistently stand together, and therefore, the offending state law must yield.

B. THE COURT OF APPEAL'S DECISION WARRANTS THIS COURT'S REVIEW BECAUSE IT CONFLICTS WITH *RAICH*, AND STANDS AS AN OBSTACLE TO THE FULL ACCOMPLISHMENT OF CONGRESS'S GOALS AND OBLIGATIONS.

1. a. The Court of Appeal's decision warrants review by this Court because, in addition to presenting an irreconcilable conflict with the CSA, the decision substantially undermines Congress's ability to accomplish its goals and obligations.

In *Raich*, this Court determined that California's exemptions for the possession and cultivation of marijuana undermine the goals of the CSA. *Gonzales v. Raich*, 545 U.S. 1 (2005). The plaintiffs in *Raich* sought an injunction against the United States Attorney General and the federal Drug Enforcement Agency, to prohibit those officials from enforcing the CSA "to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use." *Id.* at 7. The plaintiffs' central argument was that their possession and cultivation of marijuana was "in accordance with state law," and was effectively "isolated" and "policed by the State of California," such that it was "entirely separated from the interstate market." *Id.* at 30. The plaintiffs therefore contended that applying the CSA to their

conduct exceeded "Congress' authority under the Commerce Clause." *Id.* at 15, 30.

The Court in *Raich* rejected the plaintiffs' argument on two related grounds. First, the Court determined that plaintiffs' use of marijuana for "personal medical purposes on the advice of a physician" could not serve as a distinguishing factor because the "CSA designates marijuana as contraband for *any* purpose." *Id.* at 27.

Second, and more importantly, the Court recognized that the CSA was not a single-subject statute that simply makes it a crime to manufacture, distribute, or possess marijuana, but a lengthy and detailed framework that seeks to "conquer drug abuse," "control the market in controlled substances," and "prevent the diversion of controlled substances to illicit channels." *Id.* at 12-13. The Court emphasized that to effectuate its broad objectives, Congress created a comprehensive, uniform, and closed system that prohibits the manufacture, distribution or possession of any controlled substances except in a manner authorized by the CSA. *Id.* at 13-14. The Court determined that the failure to regulate the plaintiffs' activities would undercut and frustrate Congress's objectives, and leave a "gaping hole" in the CSA. *Id.* at 22.

Due to the comprehensive nature of the CSA, the *Raich* Court explained that whether the CUA's exemptions actually obstructed the CSA's objectives was irrelevant, because the Supremacy Clause "unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," *Id.* at 29, and requiring Congress to rely on

other governments to carry out its designs is "incompatible with the language of the constitution." *Id.* at 29, n. 38; quoting *McCulloch v. Maryland*, 17 U.S. 316, 424 (1819). Nevertheless, the Court went on discuss the numerous ways in which the CUA's exemptions undermine the CSA's objectives.

The Court noted that California's policy allows individuals to possess and cultivate extremely large amounts of marijuana, and that doctors, as well as cities and counties, are given full discretion to allow for even more generous limits. *Id.* at 31-32, n. 41 (recognizing that the cities of Oakland and Santa Cruz and the counties of Sonoma and Tehama allow individuals to possess up to 3 pounds of marijuana, which is the equivalent of roughly 3,000 joints or cigarettes.) The Court found the "likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious." *Id.* at 31-32.

Furthermore, given the "fungible" nature of marijuana, the "enforcement difficulties" in distinguishing marijuana truly grown for medicinal use, and the enormous demand for marijuana, the Court found it "readily apparent" that California's exemptions "would have a significant impact on both the supply and demand sides of the market for marijuana." *Id.* at 27, 30.

b. Although not discussed in *Raich*, there are several other aspects of California's marijuana laws that obstruct the accomplishment of the CSA's

objectives.[9] For example, the CUA was very narrowly drafted, and did not provide a means for individuals to obtain marijuana. *Mentch, supra* 45 Cal.4th at 286. Therefore, in an expressly stated effort to "enhance access to marijuana" – a controlled substance that the federal government is seeking to "eradicate" – the California Legislature has encouraged the collective cultivation and distribution of marijuana by providing additional criminal exemptions for those who do so, including exemptions for the possession of marijuana for sale, transporting or furnishing marijuana, and maintaining a location for unlawfully selling, giving away, or using controlled substances. Cal. Health & Saf. Code § 11362.775. In *People v. Urziceanu*, California's Third District Court of Appeal explained that this "new law represents a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana....Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." *People v. Urziceanu*, 132 Cal. App. 4th 747, 783.

Many individuals in California are cultivating and distributing large amounts of marijuana. However, unlike the CSA's stringent controls on the manufacture and distribution of controlled substances that do have a medically accepted use, the California Legislature did not place any controls on the increased

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[9] In accordance with Rule 29(4)(c), the Petitioners submit that 28 U.S.C. § 2403(b) may apply, and therefore, service of this Petition is being made on the California Attorney General.

amount of marijuana that it expected to enter the marketplace. Although the MMP established an identification card program, the program is purely voluntary, and due to the fact that marijuana remains illegal under federal law, only a small percentage of marijuana users participate.

In addition to the large amounts of marijuana being cultivated and distributed by collectives, marijuana is being sold throughout California by hundreds of "dispensaries," although nothing in California law allows for dispensaries to operate. *City of Claremont v. Kruse* 177 Cal.App.4th 1153, 1173 (2009). Some cities and counties have allowed dispensaries to operate openly and freely, while others have attempted to prohibit their operation. See L.A. to Crack Down on Marijuana Stores, *New York Times, supra* (discussing the "more than 800 dispensaries" in the City of Los Angeles alone, and the raids on dispensaries in San Diego by police officers and Sheriff's deputies, in conjunction with agents from the DEA). The massive increase in the amount of marijuana being manufactured, distributed, possessed and sold in California, coupled with the enforcement difficulties and lack of controls, undermines the CSA's primary goal of preventing the diversion of marijuana into illicit channels.

2. If there were any doubt as to whether California's marijuana laws frustrate the objectives of the CSA, the Appellate Court's creation of a property interest in marijuana forecloses that doubt. The decision will significantly decrease the amount of marijuana related investigations and seizures by law enforcement, while simultaneously increasing the amount of marijuana that is manufactured and

distributed. App. 27a. (Morrison, J., dissenting) ("Compensating Williams for the purported value of the destroyed marijuana would assure growers of marijuana that the courts of California will protect their crops."). The result will be a profoundly negative impact on the federal government's principal goal of preventing the diversion of marijuana into illicit channels, as well as the United States' ability to satisfy its obligations under the Single Convention.

3. Immediate review by this Court is warranted. Although the CSA provides a means to have marijuana rescheduled to a Schedule II narcotic, which would allow it to be prescribed for therapeutic purposes under an existing set of uniform controls, California has disregarded that process. It is clear that California's laws with respect to marijuana are directly at odds with the goals of Congress, and absent a ruling from this Court, that California's courts and Legislature will continue to expand California's marijuana laws, regardless of federal law.

The Court of Appeal's published decision leaves no factual or legal questions open, and therefore, further proceedings are not needed to clarify the issues presented. To the contrary, the decision leaves an unsustainable conflict between California and federal law, which seriously undermines the objectives of the CSA, violates the United States' obligations under the Single Convention, and makes a mockery of federal law. There is rapidly increasing litigation that invokes the decision, which creates an incentive for widespread violation of the CSA, and a major disincentive for law enforcement to make marijuana related arrests and seizures. The unnecessary conflict and confusion is

not going away, it is only increasing. Clarification on these important issues is urgently needed.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

2009 Cal. LEXIS 10302

SUPREME COURT OF CALIFORNIA

S175219

[Filed September 23, 2009]

COUNTY OF BUTTE	)
	)
v.	)
	)
WILLIAMS S.C.	)
	)

JUDGES: Baxter and Chin, JJ., are of the opinion the petition should be granted. Werdegar, J., was absent and did not participate.

OPINION

Petition for review denied.

Baxter and Chin, JJ., are of the opinion the petition should be granted.

Werdegar, J., was absent and did not participate.

APPENDIX B

175 Cal. App. 4th 729; 96 Cal. Rptr. 3d 421; 2009 Cal. App. LEXIS 1079

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

C057152

[Filed July 1, 2009]

COUNTY OF BUTTE et al., Petitioners,	)
v.	)
THE SUPERIOR COURT OF BUTTE COUNTY, Respondent;	)
DAVID WILLIAMS, Real Party in Interest.	)

COUNSEL: Bruce S. Alpert, County Counsel, and Brad J. Stephens, Deputy County Counsel, for Petitioners.

Jones & Mayer, Martin J. Mayer and Krista MacNevin Jee for California State Sheriffs' Association, California Police Chiefs' Association and California

Police Officers' Association as Amici Curiae on behalf of Petitioners.

No appearance for Respondent.

Joseph D. Elford for Real Party in Interest.

JUDGES: Opinion by Raye, J., with Scotland, P. J., concurring. Dissenting opinion by Morrison, J.

OPINION

RAYE, J.--Real party in interest David Williams is a qualified medical marijuana patient who uses marijuana upon the recommendation of his physician. Williams belonged to a seven-member collective of medical marijuana patients who agreed to contribute comparable amounts of money, property, and labor to the collective cultivation of marijuana; each then would receive an approximately equal share of the marijuana produced. The marijuana was grown at Williams's home.

In September of 2005 a Butte County Sheriff's deputy came to Williams's home without a warrant. Williams produced copies of medical marijuana recommendations for himself and the other members of the collective. The deputy ordered Williams, under threat of arrest and prosecution, to destroy all but 12 of the 41 medical marijuana plants. Williams complied.

Williams brought suit, alleging various constitutional violations by defendants Butte County, the Butte County Sheriff's Office, and the deputy involved (collectively, County). County demurred to all

causes of action based on a failure to state a cause of action. The trial court overruled the demurrer, rejecting County's argument that Williams could assert his right to grow medical marijuana cooperatively only as a defense in a criminal court. County brought a petition for writ of mandate, and we issued an alternative writ.

In its petition for writ of mandate, County argues the trial court's ruling provides that individuals have a legal right to medical marijuana that can form the basis for a civil lawsuit against law enforcement officers for money damages. County contends this ruling impermissibly expands Proposition 215 and flies in the face of case law. We shall deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

The Compassionate Use Act--Proposition 215

(1) Proposition 215, the Compassionate Use Act of 1996 (Act), created Health and Safety Code section 11362.5, which provides that statutes prohibiting possession and cultivation of marijuana "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (Health & Saf. Code, § 11362.5, subd. (d); all further statutory references are to the Health & Saf. Code.) The Act also states, as one of its purposes: "To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to

criminal prosecution or sanction." (§ 11362.5, subd. (b)(1)(B).)

The Legislature subsequently passed the Medical Marijuana Program Act (MMPA) to clarify and implement the Act. (Stats. 2003, ch. 875, § 2.) The MMPA added section 11362.77, which specifies an individual may possess no more than eight ounces of dried marijuana and maintain no more than six mature or 12 immature marijuana plants per qualified patient. (§ 11362.77, subd. (a).)

The MMPA also added section 11362.775, providing that qualified patients who associate within the state in order collectively or cooperatively to cultivate marijuana for medical purposes will not be subject to state criminal sanctions. Section 11362.775 exempts qualified persons "from criminal sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance." (*People v. Urziceanu* (2005) 132 Cal.App.4th 747, 785 [33 Cal. Rptr. 3d 859].)

Williams's Complaint

Williams's complaint alleged the following facts. Williams, a resident of Butte County, is a qualified medical marijuana patient who uses marijuana on the recommendation of his physician. Does 1 through 4 are also qualified medical marijuana patients who use marijuana on the recommendation of their physicians.

Williams and six other patients formed a seven-member collective. Each member of the collective agreed to contribute comparable amounts of money, property, and/or labor to the collective cultivation of medical marijuana, and each would receive an approximately equal share of the marijuana produced. The marijuana was grown at Williams's home.

On September 8, 2005, Butte County Deputy Sheriff Jacob Hancock came to Williams's home without a warrant. Williams presented Hancock with copies of medical marijuana recommendations for Williams and the six other qualified medical marijuana patients. Williams also informed Hancock that all seven were members of a private patient collective.

Hancock ordered Williams to destroy all but 12 of the 41 medical marijuana plants growing on his property, under threat of arrest and prosecution. Williams complied.

Williams alleged that Hancock's action was undertaken pursuant to County's policy to allow qualified patients to grow marijuana collectively only if each member actively participates in the actual cultivation of the marijuana by planting, watering, pruning, or harvesting the marijuana.

Williams's complaint alleged (1) violation of the constitutional prohibition against municipal laws that conflict with the California Constitution, (2) unreasonable search and seizure, (3) violation of due process, (4) violation of the Tom Bane Civil Rights Act (Civ. Code, § 52.1), and (5) conversion. County demurred to the complaint in its entirety.

County's Demurrer

In its demurrer, County argued that if Williams believed he was lawfully cultivating all 41 marijuana plants, his only option under the law was to refuse to remove the plants and to prove the legality of the patient collective in criminal court. Instead, County contends, Williams is attempting to convert the limited defense provided to him under the Act into an affirmative right, allowing him to challenge Hancock's actions and seek civil damages.

In addition, County argued, under the Act a qualified patient may share his marijuana with another qualified patient only if the supplying patient is the primary caregiver of the second patient.

County also filed a motion to strike Williams's complaint. County argued the California Constitution does not authorize a money damages remedy for claims alleging an unreasonable search and seizure.

The Trial Court's Ruling

The trial court overruled County's demurrer. The court reviewed the Act and concluded: "[I]t appears that, contrary to the stated policy of the County, the legislature intended collective cultivation of medical marijuana would not require physical participation in the gardening process by all members of the collective, but rather would permit that some patients would be able to contribute financially, while others performed the labor and contributed the skills and 'know-how.'"

The court observed that County, in its demurrer, did not focus on an interpretation of the MMPA, but on

their contention that the Act provides a defense in criminal court and nothing more. Under County's theory, Williams's only recourse was to refuse the deputy's order, be arrested, and address the matter in criminal court after criminal charges were brought against him.

The court found County's argument without merit. The court explained: "While it is true that the medical marijuana provisions do not specifically authorize an action by a patient for unlawful seizure of his marijuana, the constitution and laws of the state which otherwise protect the rights of citizens may nevertheless provide an avenue for relief. Thus, if plaintiff can show that he had a legal right to possess the marijuana in question, and that his rights were violated, he may bring his action based on generally applicable legal principles. Seriously ill patients certainly should not be required to risk criminal penalties and the stress and expense of a criminal trial in order to assert their rights. The plaintiff states a theory which would allow a civil court, rather than the criminal courts, to interpret and determine what constitutes Compassionate Use, who are qualified patients and what cooperative/collective efforts are included under the statute. The civil court appears to be an equally appropriate forum to address the issues of medical patients' rights."

The court did not see any likelihood of inconsistent rulings in this case, since there was no criminal case pending or likely to be brought. In addition, the court rejected County's argument, regarding Williams's search and seizure claim, that the medical marijuana laws do not prohibit police from investigating possible violations of the law. The court concluded: "This is

true, however the complaint is based also on the destruction of the marijuana plants, which was directed by the officer on pain of arrest. This could certainly be considered a seizure, and is sufficient to support the cause of action, even without reference to the alleged warrantless search."

The court also denied County's motion to strike. The court found County failed to establish, as a matter of law, that money damages are unavailable: "Because new case authority may be forthcoming, and because the parties have not provided thorough briefing, the court is reluctant to make a final determination at this stage on a matter as to which, at present, there is no clear authority in California."

County filed a petition for writ of mandate.

DISCUSSION

County argues the Act does not grant individuals immunity from being arrested for marijuana offenses, nor does the Act grant individuals a constitutional right to marijuana. Therefore, the court's assertion that the Constitution and the laws of the state provide an avenue for relief is in error.

According to County, if Williams believed that its deputy did not have probable cause to arrest him, his sole option was to face arrest and then challenge any resulting charges by filing a motion to set aside the indictment or information, or asserting an affirmative defense at trial. The fact that Williams may undergo the expense and stress of criminal proceedings, County contends, is inherent in the process approved by the voters in passing Proposition 215. Therefore,

Williams's alleged status as a qualified patient does not provide him standing to pursue a cause of action for conversion, unreasonable search and seizure, due process, or any other civil action.

We disagree with County's assertion that the Constitution and laws of the state do not provide Williams any relief at law. Recently, in *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355 [68 Cal. Rptr. 3d 656] (*Garden Grove*), the appellate court considered whether the police department was required to return lawfully possessed marijuana its officers had seized. The city argued neither the Act, the MMPA, nor section 11473.5 *expressly* provided for the return of lawfully possessed marijuana. However, the court pointed out the city's position failed to recognize "the police cannot retain a person's property without running afoul of basic constitutional considerations. ... 'Continued official retention of legal property with no further criminal action pending violates the owner's due process rights. [Citation.]'" (*Garden Grove, supra*, 157 Cal.App.4th at pp. 386-387.)

The court distinguished a prior decision in which a defendant requested return of a "reasonable amount" of marijuana for medicinal purposes after charges were dismissed in the furtherance of justice because he was already serving time on another case. In the prior case, the defendant was not a qualified user under the Act and not in lawful possession of the marijuana under section 11473.5. Therefore, the marijuana had to be destroyed. (*Garden Grove, supra*, 157 Cal.App.4th at pp. 387-388, citing *Chavez v. Superior Court* (2004) 123 Cal.App.4th 104 [20 Cal. Rptr. 3d 21].)

The court reasoned: "Even though state law is silent as to whether a qualified patient like Kha is entitled to the return of his marijuana once criminal charges against him have been dismissed, due process principles seem to us to compel that result. Continued official retention of a qualified patient's marijuana simply cannot be squared with notions of fundamental fairness. The City no doubt has every right to retain a defendant's marijuana if it is pursuing a marijuana-related prosecution against him, or if the defendant's possession does not comport with the [Act]. In those situations, the law clearly contemplates the destruction of the subject marijuana. ... [¶] But neither of those circumstances exist here. Withholding small amounts of marijuana from people like Kha who are qualified patients under the [Act] would frustrate the will of the people to ensure such patients have the right to obtain and use marijuana without fear of criminal prosecution or sanction. [Citation.] It would also ... be inconsistent with due process, as well as other provisions of the law that contemplate the return of lawfully possessed property." (*Garden Grove, supra*, 157 Cal.App.4th at p. 388.)

Ultimately, the court in *Garden Grove* determined that because the defendant was legally entitled to possess the marijuana, due process and fundamental fairness dictated it be returned to him. (*Garden Grove, supra*, 157 Cal.App.4th at p. 389.) We believe the same considerations of due process and fundamental fairness are operative in the present case.

(2) Here, the deputy, without a warrant, ordered Williams, on threat of arrest, to destroy a portion of the medical marijuana plants maintained by the collective. (3) Article I, section 13 of the California

Constitution guarantees individuals the right to be secure in their persons, houses, papers, and effects, free from unreasonable searches and seizures. As the Supreme Court has noted, in the context of medical marijuana: "To be sure, law enforcement officers must have probable cause before they lawfully may arrest a person for any crime. [Citations.] Probable cause depends on all of the surrounding facts [citation], including those that reveal a person's status as a qualified patient or primary caregiver under [the Act]." (*People v. Mower* (2002) 28 Cal.4th 457, 468-469 [122 Cal. Rptr. 2d 326, 49 P.3d 1067] (*Mower*).)

Williams seeks to challenge the deputy's lack of probable cause leading up to the deputy's demand that he destroy numerous marijuana plants. County, citing our opinion in *People v. Fisher* (2002) 96 Cal.App.4th 1147 [117 Cal. Rptr. 2d 838] (*Fisher*), argues Williams cannot claim the deputy's lack of probable cause violated his rights. In *Fisher*, officers obtained a search warrant after spotting marijuana growing on the defendant's property. When the officers attempted to execute the warrant, the defendant claimed to be a medical marijuana patient and provided his physician's recommendation. Still believing there remained a possibility a crime was being committed, the officers continued to search and found more marijuana, a weapon, and ammunition. (*Id.* at p. 1149.) A jury convicted the defendant of unlawful possession of the weapon and ammunition, but acquitted him of the marijuana charges. (*Id.* at p. 1150.)

In *Fisher*, the defendant appealed, arguing the trial court erred in denying his motion to suppress all of the evidence because of his status as a medical marijuana

patient. We rejected the defendant's argument, noting that when the officers obtained the search warrant, they did so without knowledge of the defendant's status as a medical marijuana patient. When the officers became aware of the defendant's claim, they were unsure whether a crime had been committed and did not have "the option to make a redetermination of probable cause." (*Fisher, supra*, 96 Cal.App.4th at pp. 1150-1151.) Operating under the authority of the warrant, the officers were no longer authorized to make a probable cause determination. (*Ibid.*)

No such warrant and concomitant authority exists in the present case. Here the deputy, without a warrant, ordered Williams to destroy marijuana plants. Lacking a warrant, an officer must possess ""facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. ..."" [Citation.]" (*Mower, supra*, 28 Cal.4th at p. 473.) Any consideration of probable cause must include the officer's consideration of the individual's status as a qualified medical marijuana patient. (*Id.* at pp. 468-469.)

County argues the Supreme Court opinion in *Mower* completely contradicts the trial court's ruling allowing Williams to bring a civil action based on a violation of his constitutional rights. The Supreme Court in *Mower* determined the Act does not afford qualified medical marijuana patients a complete immunity from arrest because of their status as patients. According to *Mower*, officers must have probable cause before they lawfully arrest a person for any crime. However, the requirement of probable cause does not mean that the Act must be interpreted

to grant medical marijuana patients immunity from arrest. Immunity from arrest is exceptional and, when granted, ordinarily is granted expressly. The court found the Act does not expressly grant immunity from arrest. (*Mower, supra*, 28 Cal.4th at pp. 468-469.)

The court further found the language and purpose of the Act granted a defendant a limited immunity from prosecution. This limited immunity allows a defendant to raise his or her status as a qualified patient at trial, and also permits a defendant to raise this status by moving to set aside the indictment or information prior to trial based on a lack of probable cause. (*Mower, supra*, 28 Cal.4th at p. 464.)

County claims *Mower* stands for the proposition that qualified patients may assert a violation of constitutional rights only in the arena of a criminal prosecution. They must refuse to obey an official action, be arrested, and then challenge the officer's determination of probable cause in a motion to set aside the charges. We disagree.

Nothing in *Mower* speaks to the issue of a civil action for violation of a qualified patient's constitutional rights. Here, Williams is not claiming complete immunity from arrest; there was no arrest. Instead, Williams seeks an adjudication as to whether the deputy had probable cause to order Williams to destroy his property, or whether a lack of probable cause led to a violation of his constitutional rights.

Nor are we persuaded by County's argument that Williams fails to present a justiciable controversy, or that allowing the case to proceed will lead to unnecessary disorder and confusion. Without

authority, County claims "Williams' allegations passed the point of ripeness, and were rendered moot, when Williams agreed to remove a portion of the plants." County provides no discussion of this claim and fails to explain why this renders Williams's causes of action based on the search and seizure of his property nonjusticiable.

County also contends it is not within the trial court's field of judicial administration to determine in the abstract whether Williams's actions will enable him to assert a defense to criminal charges. However, Williams is not asserting a defense; Williams is seeking to challenge an alleged violation of his civil rights in a civil action.

Recently the Supreme Court in *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920 [70 Cal. Rptr. 3d 382, 174 P.3d 200] (*Ross*) found an employee who used medical marijuana with a physician's recommendation under the Act and was fired after failing a preemployment drug test could not state a cause of action for termination in violation of public policy. The Act did not speak to employment law or put an employer on notice it would be required to accommodate medical marijuana users.

According to the court: "An employer's refusal to accommodate an employee's use of marijuana does not affect, let alone eviscerate, the immunity to criminal liability provided in the act. We thus give full effect to the limited 'right to obtain and use marijuana' [citation] granted in the act [citation] by enforcing it according to its terms." (*Ross, supra*, 42 Cal.4th at p. 929.)

In the present case Williams's claim does not implicate employment law, property law, or any other discrete branch of the law. Instead, Williams posits causes of action based on his constitutional right to due process, a right growing out of the administration of criminal law, the very subject of the Act.

Nor do we see floodgates opening and lawsuits flooding our burdened court system as a result of Williams's suit. Instead, we see an opportunity for an individual to request the same constitutional guarantee of due process available to all individuals, no matter what their status, under the state Constitution. The fact that this case involves medical marijuana and a qualified medical marijuana patient does not change these fundamental constitutional rights or an individual's right to assert them.

Our dissenting colleague asserts that under federal law "marijuana is just as illegal as cocaine, and therefore is contraband per se ... ." (Dis. opn., *post*, at p. 743.) Thus, marijuana cannot be lawfully possessed, not even by desperately ill patients who obtain permission to use marijuana for medical purposes; such permission will be useful in a criminal prosecution but is worthless in resisting warrantless intrusions and seizures by law enforcement. This anomalous result, which would surely shock the sensibilities of the voters who approved the initiative measure, is compelled, according to the dissent, because federal law reigns supreme. We disagree.

(4) We have acknowledged that the Act has no effect on marijuana arrests and prosecutions or searches and seizures under federal law. The many authorities cited by the dissent on contraband per se

all involve property characterized as such under the laws of the seizing jurisdiction. The Act presents the unusual circumstance of a state law that, under limited circumstances, permits the possession of a substance deemed to be contraband under federal law. There are no decisions holding that federal law renders the Act unconstitutional or otherwise unenforceable. Here, the deputy was acting under color of California law, not federal law. Accordingly, the propriety of his conduct is measured by California law. The numerous federal authorities cited by the dissent are without application in the present appeal.

DISPOSITION

We deny County's petition for a writ of mandate. Having served its purpose, the alternative writ is discharged. Williams shall recover costs in this original proceeding. (Cal. Rules of Court, rule 8.493(a)(1).)

Scotland, P. J., concurred.

DISSENT

MORRISON, J.,* Dissenting.--I would grant the writ. The fourth amended complaint fails to state a cause of action and, therefore, to avoid a needless trial, the demurrer should have been sustained.

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* Retired Associate Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

I adhere to the views expressed in *People v. Bianco* (2001) 93 Cal.App.4th 748 [113 Cal. Rptr. 2d 392], and in my concurrence in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1447-1448 [7 Cal. Rptr. 3d 226], that the United States Congress should reconsider its refusal to amend the federal drug laws to make reasonable accommodation for the 13 states that have enacted some form of compassionate use exception to their penal codes.[1]

The People of California, in exercising their right of initiative, passed the Compassionate Use Act (the CUA) allowing the use of marijuana under physician supervision when it is medically effective, but Congress has not chosen to enact such a law and the United States Supreme Court has held that even such narrow usage obstructs federal law. (*Gonzales v. Raich* (2005) 545 U.S. 1 [162 L.Ed.2d.1, 125 S. Ct. 2195] (*Raich*).)

As I stated in my concurrence in *Tilehkooh*, and as is pointed out in *City of Garden Grove v. Superior Court* (2007) 157 Cal.App.4th 355 [68 Cal. Rptr. 3d 656] (*Garden Grove*), peace officers swear to uphold

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[1] Twelve states in addition to California have passed laws in line with the CUA (Compassionate Use Act of 1996; Health & Saf. Code, § 11362.5), generally allowing (so far as state law is concerned) the use of marijuana for medical purposes. (See Alaska Stat. § 17.37.010 et seq.; Colo. Const., art. 18, § 14; Haw. Rev. Stat. § 329-121 et seq.; Me. Rev. Stat. Ann., tit. 22, § 2383-B; Mich. Comp. Laws § 333.26421 et seq.; Mont. Code Ann. § 50-46-101 et seq.; Nev. Rev. Stat. § 453A.010 et seq.; N.M. Stat., ch. 26, art. 2B; Or. Rev. Stat. § 475.300 et seq.; R.I. Gen. Laws § 21-28.6-1 et seq.; Wash. Rev. Code § 69.51A.005 et seq.; Vt. Stat. Ann., tit. 18, ch. 86.)

the Constitution and laws of both California and the United States. (*People v. Tilehkooh, supra*, 113 Cal.App.4th at pp. 1447-1448 (conc. opn. of Morrison, J.); *Garden Grove, supra*, 157 Cal.App.4th at p. 391, fn. 15.) Imposing civil liability for an officer who complies with federal law will lead to further confusion surrounding medical marijuana. Judges take the same oath, and the courts should not encourage illegal acts.

Under the laws of the United States, as interpreted by *Raich*, the *only* effect of the CUA is as its terms state: It provides a defense to California *criminal* charges. (See *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 928-929 [70 Cal. Rptr. 3d 382, 174 P.3d 200] (*Ross*).) It does not make marijuana "legal" in any sense.

In this case the CUA is not raised as a shield against criminal charges; it is used as a sword in an attempt to impose civil liability against a peace officer. Allowing this suit to proceed exceeds the proper scope of the CUA, frustrates federal law, requires California courts to validate illegal conduct and needlessly complicates the work of law enforcement. Therefore, I would issue a peremptory writ of mandate.

A.

It is illegal under the federal Controlled Substances Act (CSA; 21 U.S.C. § 801 et seq.) for any private person to possess marijuana. (21 U.S.C.A. §§ 812, schedule I(c)(10), 844(a); see *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 811-812 [81 Cal. Rptr. 3d 461] (*NORML*).) This applies to medical marijuana. (*Raich, supra*, 545 U.S. 1.)

Because of the perceived minor nature of marijuana as compared to other drugs and other crimes generally, federal law enforcement agencies rarely investigate or seek prosecution for people who simply possess marijuana. This has led many people and some courts to assume there is no federal interest in preventing marijuana possession, or at least, to act as if that were the case. But such a view can only be based on a crabbed and unfair reading of *Raich*, which held that Congress could properly conclude that allowing "home-consumed marijuana outside federal control would ... affect price and market conditions," and there was a "likelihood that the high demand in the interstate market will draw [homegrown] marijuana into that market." (*Raich, supra*, 545 U.S. at p. 19.) *Raich* invoked the supremacy clause to rebut a claim that compliance with the CUA took such conduct beyond the reach of Congress. (545 U.S. at p. 29.) "[T]hat the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana ... is readily apparent." (*Id.* at p. 30.) "The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market." (*Id.* at p. 31.)

Therefore, under *Raich*, marijuana, even if grown in the backyards of very ill Californians acting on the advice of their doctors, is illegal. Fostering the cultivation of marijuana in California, regardless of its intended purpose, violates federal law. I disagree with cases holding to the contrary. (E.g., *NORML, supra*, 165 Cal.App.4th at pp. 818-822; *Garden Grove, supra*, 157 Cal.App.4th at pp. 380-386.)

The point where *Garden Grove* goes astray is when it pronounces the possession of marijuana under the

CUA "was legal under state law, but illegal under federal law." (*Garden Grove, supra*, 157 Cal.App.4th at p. 377.) The marijuana was not "legal" under state law, because California cannot make "legal" that which Congress makes illegal. Citing *People v. Mower* (2002) 28 Cal.4th 457, 482 [122 Cal. Rptr. 2d 326, 49 P.3d 1067], *Garden Grove* stated that the California Supreme Court had determined that "The possession and cultivation [if done under the CUA] become just as lawful as 'the possession and acquisition of any prescription drug.'" (157 Cal.App.4th at p. 372.) But *Garden Grove* mischaracterized the holding of *Mower*: The California Supreme Court instead said "the possession and cultivation of marijuana [under the CUA] *is no more criminal*--so long as its conditions are satisfied--than the possession and acquisition of any prescription drug with a physician's prescription." (*Mower, supra*, 28 Cal.4th at p. 482, italics added.) *Garden Grove* used "lawful" as a synonym for noncriminal, but there is a difference. That difference was confirmed by the California Supreme Court in *Ross*, holding that the CUA did *not* give "marijuana the same status as any legal prescription drug." (*Ross, supra*, 42 Cal.4th at p. 926.) Instead, it "merely exempted [persons complying with the CUA] from criminal liability under two specifically designated state statutes." (*Ibid.*) This mistake by *Garden Grove* influenced its analysis and led to an erroneous result, authorizing the return of marijuana to a private person, in violation of federal law.

NORML goes astray when it asserts the issuance of government identification cards to facilitate marijuana use under the CUA and amending legislation does "not pose a significant impediment to specific federal objectives embodied in the CSA." (*NORML, supra*, 165

Cal.App.4th at p. 826.) The principal objective of the CSA is to eliminate narcotics use, including the use of marijuana. Facilitating the use of marijuana obstructs that objective. A fair reading of *Raich* undermines *NORML*'s analysis and its conclusion.

The CUA states that one of its purposes is "[t]o ensure that seriously ill Californians have the right to obtain and use" medical marijuana. (Health & Saf. Code, § 11362.5, subd. (b)(1)(A).) While this language can be read broadly to create a protected property interest in marijuana, such interest would be of no effect in light of federal law. And the California Supreme Court has read this language narrowly, holding that the limited "'right' to obtain and use marijuana created by the [CUA] is the right" to avoid criminal sanctions. (*Ross, supra*, 42 Cal.4th at p. 929.) The CUA did not and could not vest a person with a true "right" to possess marijuana in derogation of the CSA as interpreted in *Raich*. The CUA merely created "a narrow exception to the criminal law." (*Ross*, at p. 929; see *People v. Wright* (2006) 40 Cal.4th 81, 84 [51 Cal. Rptr. 3d 80, 146 P.3d 531]; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 774 [33 Cal. Rptr. 3d 859] [CUA "created a limited defense to crimes, not a constitutional right to obtain marijuana"].)

The CSA makes marijuana contraband per se: "Contraband is of two types: contraband *per se* and derivative contraband. Contraband *per se* consists of objects which are 'intrinsically illegal in character,' 'the possession of which, without more, constitutes a crime.' [Citation.] A typical example is cocaine, a controlled substance, the possession of which is unlawful under the Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.* Courts will not entertain a claim

contesting the confiscation of contraband *per se* because one cannot have a property right in that which is not subject to legal possession." (*Cooper v. City of Greenwood, Miss.* (5th Cir. 1990) 904 F.2d 302, 304-305 (*Cooper*); see *U.S. v. Harrell* (9th Cir. 2008) 530 F.3d 1051, 1057 ["An object is contraband per se if its possession, without more, constitutes a crime; or in other words, if there is no legal purpose to which the object could be put.?].)

Under the supreme law of the land, marijuana is just as illegal as cocaine, and therefore is contraband per se: "The following shall be subject to forfeiture to the United States and no property right shall exist in them: [¶] (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter. [¶] ... [¶] (8) All controlled substances which have been possessed in violation of this subchapter." (21 U.S.C.A. § 881(a).) In part the CSA defines what may be subject to forfeiture, but it also declares that "no property right shall exist" in, among other things, specified substances including marijuana. Federal law is supreme, making marijuana contraband per se even in California.

The distinction between contraband per se and derivative contraband is critical because due process attaches to *lawful* property and to property whose status must be ascertained, such as derivative contraband, that is, property "not inherently illegal to possess." (16D C.J.S. (2005) Constitutional Law, § 1850, p. 192; see *People v. Superior Court* (*McGraw*) (1979) 100 Cal.App.3d 154, 159 [160 Cal. Rptr. 663] ["if the contraband nature of seized property is in doubt, there should be an appropriate procedure for making that determination"].)

But neither tort liability nor due process rights arise from the seizure or destruction of contraband per se.

As for tort liability, it has long been the rule that a conversion action "will not lie for property which can only be possessed in violation of law." (Bowers, A Treatise on the Law of Conversion (1917) When Subjects of Conversion, § 38, p. 29 (Bowers).) Such property cannot be returned and the possessor cannot maintain an action for damages. (*Aday v. Superior Court* (1961) 55 Cal.2d 789, 800 [13 Cal. Rptr. 415, 362 P.2d 47] ["if any of the property seized other than the named books was contraband, petitioners are not entitled to its return"]; *Plymouth Sedan v. Pennsylvania* (1965) 380 U.S. 693, 699 [14 L.Ed.2d 170, 85 S. Ct. 1246] ["The return of the contraband would clearly have frustrated the express public policy against the possession of such objects."]; *Boggs v. Rubin* (D.C. Cir. 1998) 333 U.S. App.D.C. 138 [161 F.3d 37, 40] ["'[I]ndividuals have no property right in contraband materials and contraband materials may not be returned to them.'"]; *Cooper, supra*, 904 F.2d at pp. 304-305; *U.S. v. Bagley* (8th Cir. 1990) 899 F.2d 707, 708 [" 'to allow [Bagley] to reap the economic benefit from ownership of weapons [] which it is illegal for him to possess would make a mockery of the law? "]; *Stanley-Thompson Liquor Co. v. People* (1917) 63 Colo. 456, 458 [168 P. 750, 751] [?things which are capable of no use for lawful purposes ... are not the subject of property. They cannot be recovered in replevin, nor will damages be given for their loss or injury"]; *Miller v. Chicago & N. W. Ry. Co.* (1913) 153 Wis. 431, 434 [141 N.W. 263, 264] ["courts will not regard such value as a legitimate measure of damages to be recovered, where the article is destroyed. And

where the implement has no value for any lawful purpose no damages in a case of this kind are recoverable"]; *Oviatt v. Pond* (1861) 29 Conn. 479 [liquor kept for illegal purpose deemed to have no value]; Comment, Intoxicating Liquor as the Subject of Larceny: Public Policy: The National Prohibition Act (1923) 11 Cal. L.Rev. 369, 370 (Comment) ["there may be no recovery against the government for confiscation. [Fn. omitted.] Nor may the 'possessor' sue for the value when the [illegal] goods are taken from him by a private citizen"]; cf. *U.S. v. Seifuddin* (9th Cir. 1987) 820 F.2d 1074, 1078-1079 [person convicted of felony whose firearms were later seized may be able to recoup their value because firearms are not contraband per se]; *U.S. v. McCormick* (9th Cir. 1974) 502 F.2d 281, 288 [automobile, *unlike narcotics*, is not contraband per se].)

Under settled common law principles, there can be no tort liability for the destruction of contraband per se.

Nor does the seizure and destruction of contraband per se offend due process principles. Due process protects *lawful* property interests: "'There can be no forfeiture of property without notice to the owner and a hearing at which he can be heard, except in a few cases of necessity, i.e., *property kept in violation of law which is incapable of lawful use.*'" (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 286 [231 P.2d 832], italics added; see *Net Forfeiture*, 63 Ops.Cal.Atty.Gen. 346, 354 (1980) [no need for notice "where the property is contraband (i.e., illegal to possess), has no lawful use, or constitutes a danger to the public safety"].) No prior hearing is required, as to contraband per se. (See *Samuels v. McCurdy* (1925)

267 U.S. 188, 199-200 [69 L.Ed. 568, 45 S. Ct. 264]; cf. *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 433-434 [71 L.Ed.2d 265, 102 S. Ct. 1148] [some type of hearing required for "protected property interest"].)

There are two narrow legal interests that are implicated by contraband per se, but neither has any application to the facts alleged in this case. First, a possessor of contraband per se has the right to challenge the lawfulness of its seizure in a criminal case. (See *United States v. Jeffers* (1951) 342 U.S. 48, 52-54 [96 L.Ed. 59, 72 S. Ct. 93] [fact no property rights existed in narcotics did not preclude application of exclusionary rule, but did preclude return of narcotics to the owner].) But David Williams, real party in interest here, was not prosecuted.

Second, contraband per se is treated as property for purposes of imposing criminal liability for theft and related crimes, as a matter of public policy. (See *People v. Dillon* (1983) 34 Cal.3d 441, 456-457 & fn. 5 [194 Cal. Rptr. 390, 668 P.2d 697] [taking standing marijuana can support robbery charge]; *People v. Walker* (1939) 33 Cal.App.2d 18, 20 [90 P.2d 854].) In several recent cases, armed criminals have robbed or attempted to rob persons of medical marijuana. The same thing happened during Prohibition. (Comment, *supra*, 11 Cal. L.Rev. 369 ["The daily newspapers of recent months have contained many notices of daring raids and housebreakings for the purpose of carrying away intoxicating liquor."].) Such persons are properly prosecuted for their crimes, but this does not confer any property rights on their victims.

Had Deputy Hancock been accompanied by a federal agent who ordered the destruction, no suit

would lie. (See *Raich, supra*, 545 U.S. at p. 7 [as to one party, "federal agents seized and destroyed all six" plants].) And Deputy Hancock had no legal duty to refrain from seizing and destroying all of the plants. Nothing in the complaint suggests his direction to Williams to destroy the plants was unreasonable *apart from* Williams's view that he had the right to grow marijuana. So, how has Deputy Hancock subjected himself and his department to possible liability? *Garden Grove* unfairly discounted the practical effects of its holding, that medical marijuana is protected property, to the day-to-day realities faced by state law enforcement, and this lawsuit shows why.

Compensating Williams for the purported value of the destroyed marijuana would assure growers of marijuana that the courts of California will protect their crops. This obstructs the federal policy adopted by Congress in the CSA as interpreted and upheld by the United States Supreme Court in *Raich*.

Medical marijuana users under the CUA do have some administrative protection for their marijuana. The California Attorney General, the "chief law officer of the State" (Cal. Const., art. V, § 13), has issued a bulletin that "recommends that state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws." (Cal. Dept. of Justice, Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use (Aug. 2008) p. 4.) This is a sensible position, and presumably local law enforcement agencies will adopt appropriate policies and training programs. But it is only in benign

forbearance that medical marijuana users are protected. They do not have any "right" to sue to protect their marijuana until federal law is changed.

B.

The fourth amended complaint alleges Williams "collectively cultivates marijuana" with other people at his residence. Deputy Jacob Hancock, while on duty and without a warrant, ordered Williams to destroy some but not all of the marijuana plants, and Williams did so. Williams would like to continue with the collective, but feels deterred lest he again be forced to destroy marijuana plants after investing time and energy in growing them.

The complaint alleges the Butte County Sheriff has adopted a policy limiting the way in which a collective can operate, specifically, that it can be done only if each member is an active participant in the actual cultivation. Later the complaint refers to this as an "underground" policy.[2]

The complaint is divided into five claims, styled as separate causes of action, as follows.

1. Williams contends the alleged underground policy conflicts with Health and Safety Code section 11362.775, and he is therefore entitled to declaratory and injunctive relief. I disagree. That statute provides

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[2] In *People v. Mentch* (2008) 45 Cal.4th 274 [5 Cal. Rptr. 3d 480, 195 P.3d 1061], the California Supreme Court held that a person who only supplies marijuana and instructs on its use cannot qualify as a primary caregiver under the CUA.

in full: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (Health & Saf. Code, § 11362.775.)

The alleged underground policy, as described in the complaint, does not impose any criminal sanction; therefore, it does not conflict with this statute. The destruction of property as alleged in the complaint was not a criminal sanction. Therefore the complaint fails to allege that the underground policy conflicts with state law.

Technically, a party seeking declaratory relief is entitled to a declaration of rights, even if the court concludes he or she has no rights. But it has been held that an appellate decision explaining why a party has no rights suffices. (See *Savient Pharmaceuticals, Inc. v. Department of Health Services* (2007) 146 Cal.App.4th 1457, 1464 [3 Cal. Rptr. 3d 689].) Therefore this claim does not warrant denying the writ.

2. Williams alleges an unreasonable search and seizure. Williams alleges Deputy Hancock wrongly ordered Williams to destroy the marijuana and remained "after there was no longer any probable cause to believe that [Williams] had committed any state law crime." There is no claim the search was otherwise unreasonable, for example, that the

marijuana was being grown inside the house, rather than in plain sight, or any other claim of wrongful conduct by Deputy Hancock. The facts alleged show that Deputy Hancock ordered the destruction of some, but not all, of the contraband he found on Williams's property. The complaint does not allege any facts showing any actionable wrongdoing because the property destroyed was of no legal value and suit may not be maintained for its destruction, as stated above.

3. Williams sought declaratory and injunctive relief, not damages, based on state due process principles. The relevant portion of the California Constitution provides: "A person may not be deprived of life, liberty, or property without due process of law ... ." (Cal. Const., art. I, § 7, subd. (a).) The deprivation of "property" without a hearing is a violation of this section. (See *Hughes v. Neth* (1978) 80 Cal.App.3d 952, 960 [146 Cal. Rptr. 37]; *Modern Loan Co. v. Police Court* (1910) 12 Cal.App. 582, 585 [108 P. 56]; see 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, §§ 678-679, pp. 1097-1098 [subsequent hearing may protect property interest].) Virtually anything anyone can *legitimately* possess, transfer or acquire may be protected property. (See *Traverso v. People ex rel. Dept. of Transportation* (1993) 6 Cal.4th 1152, 1160 [26 Cal. Rptr. 2d 217, 864 P.2d 488].) However, marijuana is not protected property.

The California due process clause, however, does not necessarily turn on the existence of a property or liberty interest, as does the federal due process clause. Our state due process clause also protects a dignity interest, the right to be free from "arbitrary adjudicative procedures." (*People v. Ramirez* (1979) 25

Cal.3d 260, 264 [158 Cal. Rptr. 316, 599 P.2d 622]; see *id.* at pp. 267-269.) But when examined, the difference is small, and the state law "'claimant must nevertheless identify a statutorily conferred benefit or interest of which he or she has been deprived to trigger procedural due process under the California Constitution and the *Ramirez* analysis of what procedure is due.'" (*Gresher v. Anderson* (2005) 127 Cal.App.4th 88, 105 [25 Cal. Rptr. 3d 408]; see *id.* at p. 106; see *Nichols v. County of Santa Clara* (1990) 223 Cal.App.3d 1236, 1247 [273 Cal. Rptr. 84] [no hearing needed when concealed weapons permit was revoked, in part because dignity interest was satisfied when holder was told of the reason for the decision].) Here, the only "statutorily conferred" benefit is the right to be free of criminal sanctions, and to the extent the CUA can be read to confer some property interest in marijuana, it conflicts with federal law, which is the controlling law. Thus, the allegations do not plead the violation of any protected "dignity interest."

4. Williams alleged the conduct described above violated the Bane Act, Civil Code section 52.1.

Subdivision (b) of Civil Code section 52.1 provides that "Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a)," may sue. Subdivision (a) generally provides liability where "a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights

secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state."

The only "right" conferred by the CUA is immunity from prosecution, and Williams was not prosecuted. Although the CUA may be read broadly to grant property interests, as a matter of federal law it cannot. Further, the California Supreme Court has not read the CUA so broadly. (*Ross, supra*, 42 Cal.4th at pp. 928-929.)

5. Finally, Williams attempts to state a claim for conversion. A necessary component of such a claim is that the property taken has cognizable value. Contraband per se has no such value. (Bowers, *supra*, § 38, p. 29.)

C.

As interpreted by the United States Supreme Court, federal narcotics laws make marijuana contraband per se, regardless of the medical marijuana laws. There is no viable cause of action in the fourth amended complaint. There is no suggestion that the trial court should have granted leave to file a *fifth* amended complaint; therefore, the demurrer should have been sustained without leave to amend. Because there is no reason to subject the parties to the cost of a needless trial, I would issue a peremptory writ of mandate.

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF BUTTE

CASE NO. 137329

[Filed September 6, 2007]

DAVID WILLIAMS, et al.,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
BUTTE COUNTY, et al.,	)
	)
Defendants.	)
	)

RULING ON DEMURRER AND MOTION TO STRIKE

The demurrer and motion to strike of the COUNTY OF BUTTE, the BUTTE COUNTY SHERIFF'S OFFICE, and DEPUTY JACOB HANCOCK to the fourth amended complaint came on regularly for hearing before this department on June 8, 2007. The court heard argument and took the matter under submission.

DEMURRER

A demurrer tests the legal sufficiency of the complaint, not the evidence or the facts alleged, and will be sustained only where the pleading is defective on its face. If it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good, although the facts may not be clearly stated, or the plaintiff may demand relief to which he or she is not entitled.

COMPLAINT

The complaint alleges as follows:

Plaintiff Williams was and is a qualified medical marijuana patient who uses marijuana upon the recommendation of his physician. DOES I-IV are also qualified medical marijuana patients who use marijuana upon the recommendation of their physicians, in accordance with the Compassionate Use Act, as part of a seven member collective with the plaintiff. Each of the seven members agreed that they would contribute comparable amounts of money, property, and/or labor, or combination thereof, to the collective cultivation of medical marijuana and each would receive an approximately equal share of the marijuana produced. The marijuana was grown at plaintiff Williams' house. On September 8, 2005, Deputy Hancock came to Williams house without a warrant and, despite being presented with copies of medical marijuana recommendations for Williams and the six other qualified medical marijuana patients and being told that all were members of a private patient collective, Hancock ordered Williams to destroy all but twelve of the forty-one medical marijuana plants

growing on his property, under threat of arrest and prosecution. Deputy Hancock remained on Williams' property the entire time that it took Williams to remove the 22 medical marijuana plants. Plaintiffs further allege that the deputy's action was undertaken pursuant to the policy of Butte County to allow qualified patients to grow marijuana collectively only so long as each member actively participates in the actual cultivation of the marijuana by, for example, planting, watering, pruning or harvesting the marijuana.

Plaintiff now sues for (1) violation of the constitutional prohibition against municipal laws which conflict with the California constitution, (2) unreasonable search and seizure, (3) violation of due process, (4) violation of the Bane Civil Rights Act, (5) and conversion. Defendants demur to all causes of action based on failure to state a cause of action, and failure to state a cause of action due to lack of ripeness.

DEMURRER

First Cause of Action - Declaratory and Injunctive Relief

The first cause of action is for violation of the California constitution, Art 11, §7, and Government Code 37100, which essentially provide that a county or city may make and enforce ordinances and regulations not in conflict with general laws of the state. The declaratory relief sought is simply "that this Court declare the rights of all parties". The injunctive relief sought is a preliminary and permanent injunction against "continuing to violate the constitutional rights

of qualified medical marijuana patients to be free from unreasonable searches and seizures".

Plaintiffs allege that the Sheriff's Department has a policy that each medical marijuana user may have no more than twelve plants, and that all members of a marijuana growing collective must actively participate in the actual cultivation of the plants. Plaintiffs contend that this policy conflicts with Health & Safety Code 11362.775, and therefore is invalid.

Proposition 215, the Compassionate Use Act (CUA), created Health & Safety Code 11362.5, which provides that statutes prohibiting possession and cultivation of marijuana, "do not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates medical marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." The legislature subsequently passed the Medical Marijuana Program Act (MMPA) to clarify and implement the CUA. The MMPA added, among other provisions, section 11362.77 to the Health & Safety Code. This section specifies that an individual may possess no more than eight ounces of dried marijuana, and maintain no more than six mature or twelve immature marijuana plants per qualified patient. The MMPA also added H&S Code Sec. 11362.775, which provides that "Qualified patients, . . . who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not . . . be subject to state criminal sanctions . . . .". In addition, the MMPA expanded the legal protection given to qualifying patients and primary caregivers who cooperatively cultivate medical marijuana by making them exempt from criminal liability for

numerous additional marijuana laws. Initially, under the CUA, patients and caregivers were only exempt from criminal laws forbidding possession and cultivation of marijuana. Under the MMPA (H&S Code Sec. 11362.775), qualified persons are also exempt from criminal sanctions for possession for sale, transportation or furnishing marijuana, maintaining a location for unlawfully selling, giving away, or using controlled substances, managing a location for the storage, distribution of any controlled substance for sale, and the laws declaring the use of property for these purposes a nuisance. See People v. Urziceanu (2005) 132 Cal.App.4th 737, 785. The new law "represents a dramatic change in the prohibitions pn the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers . . . . Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana." People v. Urziceanu (2005) 132 Cal.App.4th 737, 785. In light of u and the statutes cited therein, it appears that, contrary to the stated policy of the County, the legislature intended collective cultivation of medical marijuana would not require physical participation in the gardening process by all members of the collective, but rather would permit that some patients would be able to contribute financially, while others performed the labor and contributed the skills and "know-how."

Defendants' argument does not focus on interpretation of the MMPA, however, but on their contention that Prop. 215 provides a defense in criminal court, and nothing more. Under defendants'

theory, if the plaintiff wished to contest the deputy's order directing plaintiff to cut down the plants, the plaintiff's only recourse was to refuse the deputy's order, be arrested and address the matter in criminal court after criminal charges were brought against him. Defendants also argue that these issues are being litigated in criminal court, and that this court's involvement would waste judicial resources and could easily result in inconsistent rulings. Defendants cite other situations in which a prior case must be resolved before a action may be brought, such as in a case of malicious prosecution.

The court finds that the argument that patients may assert their rights to grow medical marijuana cooperatively only as a defense in criminal court to be without merit. While it is true that the medical marijuana provisions do not specifically authorize an action by a patient for unlawful seizure of his marijuana, the constitution and laws of the state which otherwise protect the rights of citizens may nevertheless provide an avenue for relief. Thus, if plaintiff can show that he had a legal right to possess the marijuana in question, and that his rights were violated, he may bring his action based on generally applicable legal principles. Seriously ill patients certainly should not be required to risk criminal penalties and the stress and expense of a criminal trial in order to assert their rights. The plaintiff states a theory which would allow a civil court, rather than the criminal courts, to interpret and determine what constitutes Compassionate Use, who are qualified patients and what cooperative/collective efforts are included under the statute. The civil court appears to be an equally appropriate forum to address the issues of medical patients' rights. The court does not see a

likelihood of inconsistent rulings in this case, as there is no criminal case pending or any indication that a criminal case is likely to be brought in connection with this matter. Defendants' other main argument, that under Prop 215, only a primary caregiver can provide medical marijuana, does not directly address the question of the effect of MMPA and whether the sheriff's deputy could require destruction of any plants in excess of 12 on the theory that other collective members were not directly participating in cultivation of the plants.

For the foregoing reasons, the demurrer is overruled.

Second Cause of Action - Unreasonable Search & Seizure

The second cause of action is for unreasonable search and seizure, in violation of Calif Const. Art I, §13. Plaintiff alleges that the deputy entered plaintiff's property without a warrant and ordered the destruction of lawfully possessed medical marijuana plants, and further that the deputy remained on the property after it was clear that there was no probable cause to believe a crime had been committed.

Defendants demur to this cause of action for failure to state a cause of action. In support of the demurrer, defendants argue that the medical marijuana laws do not prohibit police from investigating possible violations of the marijuana laws. This is true, however the complaint is based also on the destruction of the marijuana plants, which was directed by the officer on pain of arrest. This could certainly be considered a seizure, and is sufficient to support the cause of action,

even without reference to the alleged warrantless search.

The demurrer is overruled.

Third Cause of Action - Due Process

The third cause of action is for deprivation of property or liberty without due process of law under article I, section 7(a) of the California constitution. Defendants demur to this cause of action based on the argument that the only way plaintiff could establish a valid patient collective would be to refuse the officer's instruction to destroy the plants, and suffer arrest, and then raise the argument in the subsequent criminal case. Again, this argument is without merit. The civil court can and should evaluate if a patient collective has been legally formed and whether the medical marijuana is lawfully possessed, or is subject to seizure. If there was a valid patient collective, the destruction of plaintiffs' property was improper, and plaintiff should not be required to undergo criminal proceedings to vindicate his rights. The demurrer is overruled.

Fourth Cause of Action - Bane Civil Rights Act

The fourth cause of action is for interference with peaceable exercise and enjoyment of the rights secured by the constitution and laws of the State of California in violation of the Bane Civil Rights Act, Civil Code 52.1. Defendants demur generally to this cause of action, on the theory that the first amended complaint fails to demonstrate an underlying constitutional or statutory right that was violated.

The court has overruled the demurrers on the constitutional causes of action, and therefore this demurrer, being based on the others, is also overruled.

Fifth Cause of Action - Conversion

Defendants demur on the theory that the officer did not exercise physical control over the marijuana, and also on the theory that plaintiff's only recourse was to defy the officer and challenge the issue in criminal court.

Plaintiff cites cases in which a claim of conversion was based on destruction of personal property by police. The instruction by a police officer to destroy property, or face arrest, is sufficiently coercive to amount to conversion of that property. The court does not find that plaintiff was required to risk criminal liability to establish his rights herein.

The demurrer is overruled.

MOTION TO STRIKE

The motion to strike is made on the ground that money damages are not available as a remedy for plaintiff's claim for violation of his right under the California constitution to be free from unreasonable searches and seizures. In ruling on the previous demurrer, the court found that defendants have not established as a matter of law that money damages are unavailable in this situation. Because new case authority may be forthcoming, and because the parties have not provided thorough briefing, the court is reluctant to make a final determination at this stage on a matter as to which, at present, there is no clear

authority in California. Therefore, the motion to strike is denied at this time, leaving a final determination on the issue for a later stage in the proceedings.

CONCLUSION

For the reasons set forth above, the demurrer is overruled as to all causes of action, and the motion to strike is denied.

Sept. 6, 2007
Date

/s/ Barbara L. Roberts
Barbara Roberts
Superior Court Judge

APPENDIX D

COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

Case No. C057152
[Butte County Superior Court Case No. 137329]

[Filed June 4, 2008]

COUNTY OF BUTTE, COUNTY OF BUTTE SHERIFF'S OFFICE, and DEPUTY JACOB HANCOCK	)
Petitioners,	)
v.	)
SUPERIOR COURT OF BUTTE COUNTY,	)
Respondent,	)
DAVID WILLIAMS,	)
Real Party in Interest.	)

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

On Appeal from the Butte County Superior Court
The Honorable Barbara Roberts

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TO THE HONORABLE PRESIDING JUSTICE OF THE CALIFORNIA COURT OF APPEAL:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The California State Sheriffs' Association, the California Police Chiefs' Association and the California Police Officers' Association respectively request leave to file the attached brief of Amici Curiae in support of Petitioner, the County of Butte, in order to assist this Court in resolving the important issue of law presented in this matter.

The interests of Amici are as stated in the attached brief, Part I. Applicants endeavor to provide this Court with the perspective of similarly situated law enforcement of all levels regarding the important legal issue raised in this matter, specifically the importance of public entities and law enforcement officers not being liable in relation to the destruction of illegal contraband.

Amici are aware of the change in the Court's rules, effective January 1, 2008, limiting the time period within which amicus briefs may be submitted to the Court. Cal. Rules Ct., Rule 8.200 (c)(1). However, this change in rules took effect *after* this matter had already been fully briefed on December 14, 2007, and would seem to be inapplicable under the circumstances. Although supplemental briefing was permitted in February and March 2008, even the new Rule 8.200 measures the time for the filing of amicus briefs from the date of the final filing of the *primary* briefs, not any additional supplemental briefs that may be later permitted by the Court. Cal. Rules Ct.,

Rules 8.200 & 8.212. The new Rule 8.200 was not in effect at the time when the primary briefs were filed, and the version of Rule 8.200 that was in effect at the time of the filing of the parties' primary briefs in December 2007, imposed no deadline on the filing of an amicus brief.

Therefore, Applicants respectfully request leave from the Presiding Judge to file the attached brief of Amici Curiae. Amici feel that they can provide additional perspective to this Court which will be helpful in its decision on the primary issue in this case and which is of utmost importance to Amici law enforcement agencies throughout the State of California. In addition, there is good cause for permitting the filing of the brief, as stated above, and this Court may grant the filing of the brief even if the new time requirements of Rule 8.200 were to be applied. Cal. Rules Ct., Rule 8.200 (c)(1) (later filing may be permitted for good cause).

Dated: June 4, 2008

Respectfully submitted,

JONES & MAYER

By: /s/Martin J. Mayer
Martin J. Mayer and
Krista MacNevin Jee,
Attorneys for Amici Curiae,
California State Sheriffs' Association,
California Police Chiefs' Association &
California Police Officers' Association

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL:

PROPOSED BRIEF OF AMICI CURIAE

I. AMICI CURIAE INTEREST AND BENEFIT TO COURT OF AMICI CURIAE BRIEF.

Amici Curiae are the California State Sheriffs' Association ("CSSA"), the California Police Chiefs' Association ("CPCA"), and the California Police Officers' Association ("CPOA"). Each of their memberships and interests are discussed below.

CSSA represents each of the fifty-eight (58) elected California Sheriffs. CPCA represents virtually all of California's Municipal Chiefs of Police. CPOA represents more than four thousand peace officers, of all rank, throughout the State. The three Associations are interested in this case because the issue presented will have a profound impact on the members of each of the three Associations, as well as every employee under the command of the state's sheriffs and police chiefs. This includes the overwhelming majority of peace officers in the State of California.

In addition, the outcome of this case has significant ramifications for law enforcement agencies throughout the State. Pursuant to the Trial Court's reasoning, such law enforcement agencies must safeguard confiscated medical marijuana and are liable for any damage to such "property." Really, law enforcement agencies or their officers would be required, in a good many instances, to affirmatively safeguard *all* confiscated marijuana, since *any* marijuana *might*

later be deemed to have been medical marijuana. This is not only unworkable, but contrary to both State and Federal law, since the Trial Court's ruling recognizes a legally compensable property interest in *illegal contraband.*

Amici have identified this matter as one of statewide significance in which their expertise can be of assistance to the Court. This proposed brief offers a broader perspective of Amici as to the issues on appeal, namely the overarching impact of the Court's decision on law enforcement agencies and their officers regarding the investigation, confiscation and destruction of marijuana and/or medical marijuana.

In particular, if the Court of Appeal finds in favor of Appellant, then law enforcement agencies and their officers will be relieved of liability relating to the confiscation and damage or destruction to illegal contraband, regardless of whether it is characterized as medical marijuana for purposes of the Compassionate Use Act or the Medical Marijuana Program Act under State law. This amounts to a significant issue affecting law enforcement agencies throughout the State.

The undersigned have been given specific authority to make this Application on behalf of Amici.

II. STATEMENT OF FACTS.

Amici accept the pertinent facts as set forth in the briefs of the parties and offer no additional facts.

III. STATE LAW DOES NOT RECOGNIZE ANY PROPERTY RIGHTS IN MEDICAL MARIJUANA.

Under State law, there is no "right" to medical marijuana. Nor does State law even make it "legal" to possess or cultivate medical marijuana. The Compassionate Use Act provides, for instance, only a *defense* to the state criminal provisions relating to the possession or cultivation of medical marijuana under California Health and Safety Code Sections 11357 and 11358. Cal. Health & Saf. Code § 11356.2 ("CUA"). Section 11356.2 does *not* make it *lawful* to possess or cultivate medical marijuana. Notably, the CUA merely provides that Health and Safety Code "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, *shall not apply* to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." Cal. Health & Saf. Code § 11362.5 (d) (emphasis added). These provisions simply permit a medical marijuana patient or primary caregiver to avoid *criminal punishment* pursuant to those sections, but do *not* grant or create any *property right* in the marijuana and do not change the very nature of the substance possessed or cultivated pursuant to California law. In other words, marijuana is still marijuana; the fact that a patient or primary caregiver may be entitled to assert, as a defense in a criminal prosecution, the fact that marijuana was possessed or cultivated for medicinal purposes pursuant to the CUA does not miraculously transform marijuana into some other *lawful* substance or into legal *property*.

Despite the CUA, marijuana *remains* a *controlled substance* listed in Schedule I, for which there is no legally permitted use. Cal. Health & Safety Code § 11054 (d)(3) & 11007. See also 62 Cal. Op. Atty. Gen. 65 (1979) (no use for controlled substances by physicians under the California Uniform Controlled Substances Act, Cal. Health & Safety Code § 11000, et seq.). The California Controlled Substances Act specifically indicates that Schedule I controlled substances are *contraband* and subject to *seizure* and *forfeiture.* Cal. Health & Safety Code § 11475. ("Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this division are *contraband* and shall be seized and summarily forfeited to the state.") (emphasis added). In fact, State statutory provisions require that "[a]ll seizures of controlled substances . . . which are in possession of any city, county, or state official . . . as the result of a case in which no trial was had or which has been disposed of by way of dismissal or otherwise than by way of conviction, shall be *destroyed* by order of the court, unless the court finds that the controlled substances, . . . were *lawfully possessed* by the defendant." Cal. Health & Safety Code § 11473.5 (a) (emphasis added).

Similarly, the Medical Marijuana Program Act ("MMPA") expanded the specific *defenses* permitted to patients and caregivers, by prohibiting "*criminal liability* under Section *11357, 11358, 11359, 11360, 11366, 11366.5, or 11570*" relating to the possession, planting, harvesting, processing, transportation, place for manufacturing or distribution, etc. of marijuana. Cal Health & Safety Code § 11362.765 (emphasis added). The MMPA, then, likewise simply prohibits the criminal punishment that is permitted under

California law for someone who commits violations of those specified sections with the recommendation of a physician. Neither of these statutory schemes *immunize* those possessing, cultivating or using medical marijuana from arrest or confiscation of the marijuana. More importantly, neither change the legal *character* of the marijuana itself, which still constitutes *contraband*, whether for medical purposes or not. See, Chavez v. Superior Court, 123 Cal. App. 4th 104, 110 (2004) ("Defining the boundaries of the Compassionate Use Act, the Supreme Court has held section 11362.5 does not afford a patient absolute immunity from *arrest and prosecution*, but only *limited immunity* allowing the patient or primary caregiver to raise the medical use *defense* to set aside an information, indictment, or as a defense at trial.") (emphasis added) *(citing* People v. Mower, 28 Cal.4th 457, 470 (2002)); People v. Fisher, 96 Cal. App. 4th 1147, 1152 (2002) ("[T]he exception constitutes an *affirmative defense* to be proven by the defendant at trial. See also, Ross v. Ragingwire Telecommunications, 42 Cal. 4th 920, 923 (2008) (CUA "gives a person who uses marijuana for medical purposes on a physician's recommendation a *defense* to certain state criminal charges involving the drug, including possession") (emphasis added).

This conclusion comports with the rebuttal argument against Proposition 215, the initiative measure enacting section 11362.5, contained in the ballot pamphlet presented to voters, which reads: 'Police officers can still arrest anyone who grows too much, or tries to sell it. . . . [P] . . . Police officers can still *arrest anyone for marijuana offenses*. Proposition 215 simply gives those arrested a *defense* in court, if they can prove they used marijuana with a doctor's

approval.' (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) rebuttal to argument against Prop. 215, p.61.)") (omissions and addition in original) (emphasis added). Therefore, pursuant to the provisions of the CUA and the MMPA, Respondent was not in *lawful* possession of the marijuana that he was cultivating, and which he destroyed at the direction of a Butte County sheriff's deputy. There can be no civil action for violation of constitutional or statutory rights with respect to marijuana where it is not recognized under any law as having been *lawfully* possessed or *legal* property.

The fact that Respondent may have been entitled to assert the protections of either the CUA or the MMPA as an *affirmative defense* to criminal charges, which might have been brought against him relating to his collective or cooperative cultivation of medical marijuana, does not translate into *lawful* possession of marijuana pursuant to State law. For instance, marijuana need not be returned to a criminal defendant, even after dismissal of a criminal complaint, because marijuana is *contraband*. Chavez, 123 Cal. App. 4th at 108 (denying writ of mandate and upholding trial court's refusal to return confiscated marijuana upon dismissal of criminal complaint, based upon fact that court was without authority to return *contraband).*

No distinction is made under State law, in terms of the definition and classification of, between marijuana that is illegally used and that which is used for medical purposes pursuant to the CUA; all "controlled substances," of which *all* marijuana is a part *irrespective* of the CUA or MMPA, must be *destroyed*. Cal. Health & Safety Code § 11473.5 (a). All marijuana is a Schedule I controlled substances pursuant to State

law. If full rights as to marijuana, including *property* rights, were desired by the People, then the provisions of the CUA should have been broader; they were not, and this Court cannot expand those rights that are in place in order to fit some stated or implied intent that is not actually manifested in the statutory provisions adopted by the People or the Legislature as part of the CUA or the MMPA.

Respondent would have this Court determine that there can be a property interest in marijuana, but the Supreme Court has already determined the fundamental underpinnings of this notion in favor of Appellant. The Supreme court in Ross v. Ragingwire Telecommunications, 42 Cal. 4th 920, 926 (2008), notably determined that the CUA did *not* give medical marijuana the same *status* as legal prescription drugs. California and Federal law both still define marijuana as a Schedule I substance, that *cannot* be prescribed, used or possessed for any purpose except sanctioned research. The CUA merely indicates the State's refusal to *prosecute* offenders, pursuant to its own controlled substance penal statutes, who use marijuana for personal medical purposes.

The CUA does not extend to the realm of property, anymore than the Supreme Court found that it did not extend to the realm of employment law. Id. at 926 ("The voters were entitled to change the criminal law without also speaking to employment law."). The Ross Court rejected the employee's contention that there was some "broad right to use marijuana without hindrance or inconvenience," as a result of the enactment of the CUA. Id. at 928. Instead, the "right" afforded by the CUA was very limited, only providing the "right" to possess and use marijuana for personal

medical purposes without being subject "to *punishment* under sections 11357 and 11358 of the Health and Safety Code." Id. at 929 (emphasis added). The CUA and the derivative MMPA simply did not go as far as Respondent would have liked in order to have substantiated his claims against a demurrer; they did not reclassify marijuana and did not elevate its nature to *lawful property*.

IV. FEDERAL LAW ALSO DOES NOT RECOGNIZE ANY PROPERTY RIGHTS IN MEDICAL MARIJUANA.

Federal law also provides that the possession and cultivation of *any* marijuana is prohibited, and also that such material is *contraband* and subject to forfeiture. 21 U.S.C. § 812, schedule 1 (c)(10) (identifying marijuana as a schedule I drug).[1] See also, 21 U.S.C. § 881 (a) ("The following shall be subject to forfeiture to the United States and *no property right shall exist in them:* (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter. . . . (8) All controlled substances which have been possessed in violation of this subchapter.") (emphasis added); 21 U.S.C. § 881 (f)("(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; . . . shall be deemed *contraband* and seized

---

[1] Schedule I drugs are the most regulated and have the following characteristics: (A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. § 812 (b)(1).

and *summarily forfeited* to the United States.") (emphasis added).

The United States Supreme Court has indicated that, "[b]y classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the *sole exception* being use of the drug as part of a Food and Drug Administration pre-approved research study." Gonzales v. Raich, 545 U.S. 1, 14 (2005) (emphasis added) *(citing* 21 U.S.C. §§ 823(f), 841(a)(1), 844(a); United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 490 (2001)). The Raich Court further specifically found that "[t]he regulatory scheme [of the Controlled Substances Act] is designed . . . to prohibit *entirely* the *possession* or *use* of substances listed in Schedule I, except as a part of a strictly controlled *research project."* Raich, 545 U.S. at 24 (emphasis added).

Furthermore, it is "unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a *practitioner."* 21 U.S.C. § 844 (a) (emphasis added). The term "practitioner" is defined under Federal law as "a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research." 21 U.S.C. § 802 (21). There is no evidence that

Respondent lawfully *obtained* the marijuana that was in his possession and was being cultivated by him.

Medical marijuana, then, is not simply permitted by State law and prohibited by Federal law. All marijuana is classified in the same manner under both Federal and State law, and is contraband under both. And even *if* marijuana could be *lawfully* possessed or cultivated under State law, it cannot be lawfully possessed or cultivated for *any* purpose under Federal law, whether for medicinal purposes or whether pursuant to State law. Raich, 545 U.S. at 29 ("The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected. Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just 'plausible' . . . , it is readily apparent."). See also, Ross v. Ragingwire Telecommunications, 42 Cal. 4th 920, 926 (2008) ("No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law even for medical users.") (*citing* 21 U.S.C. §§ 812, 844(a); Gonzales v. Raich, supra, 545 U.S. 1, 26-29; United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 491–495 (2001)).

Since there is no dispute that marijuana cannot be *lawfully* possessed or cultivated pursuant to Federal law, then the substance cannot be characterized as property, even under State law, *assuming arguendo* State law even made the possession and cultivation of marijuana permissible. Moreover, a broad view of medical marijuana in the State law context completely

ignores the existence of Federal law prohibitions against marijuana, which are complete prohibitions, *even* for medical purposes, and which apply to *all* marijuana. The contradictions that the CUA and the MMPA create vis-à-vis Federal law cannot be easily ignored or put aside.

In particular, Federal law preempts State law on the issue of medical marijuana. The United States Supreme Court has found that Congress was well within its Commerce Clause power in regulating marijuana as a controlled substance under the Controlled Substances Act. Raich, 545 U.S. at 27-8. The United States Supreme Court found that marijuana -- *any* marijuana in *any* amount and for *any* purpose, is *contraband*. Id. at 26-7 ("The CSA [Controlled Substances Act] designates marijuana as contraband for *any* purpose.") (emphasis in original). Notwithstanding the fact that the Controlled Substances Act permits States to *also* regulate controlled substances, the CSA specifically limits that permission to instances not involving "a positive conflict" between a State's regulations and the CSA "so that the two cannot consistently stand together." This requirement is not satisfied where State law has the effect of allowing individuals to be in possession or cultivate marijuana for medical purposes, where such possession and cultivation is completely prohibited under Federal law. Raich, 545 U.S. at 29 ("state action cannot circumscribe Congress' plenary commerce power"). The Raich Court found as follows: "the mere fact that marijuana--like virtually every other controlled substance regulated by the CSA--is used for *medicinal purposes* cannot possibly serve to distinguish it from the core activities regulated by the CSA." Id. at 28 (emphasis added).

Although the CUA and the MMPA only directly permit a defense against state law criminal liabilities, their indirect effect is to *allow* possession and cultivation of marijuana, in direct conflict with the CSA. Therefore, the former are preempted by the latter, by necessity, in accordance with the fact that the CSA has a purpose of "controlling the *legitimate and* illegitimate traffic in controlled substances. Gonzales v. Oregon, 126 S. Ct. 904, 911 (2006) (emphasis added).

Moreover, Federal law has conclusively determined, by placing marijuana in Schedule I of the CSA, that there *is no* medicinal use of marijuana. Gonzales v. Oregon, 546 U.S. 243, 268-69 (2006) ("Congress' express determination that marijuana had no accepted medical use foreclosed any argument about statutory coverage of drugs available by a doctor's prescription.") *(citing* United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001)).

The Court in Gonzales v. Oregon found that Oregon's Death with Dignity Act did not conflict with the CSA, despite allowing the prescribing of lethal doses of controlled substances. However, the controlled substances at issue in Gonzales v. Oregon were *Schedule II* drugs, which were substances available by *prescription*. Id. at 250. In contrast, marijuana, as a *Schedule I* drug, is *not* available by prescription under the CSA. While, under Gonzales v. Oregon, the United States Supreme Court may have found that States retained the ability to control *medical* uses for *Schedule II* drugs, which could legitimately be prescribed by doctors registered with the federal government for purposes of dispensing drugs under the CSA, the Supreme Court did *not* find that the same

intent existed with respect to *Schedule I* drugs that *cannot* be prescribed by physicians *at all*. As to Schedule I drugs, Congress clearly had the intent to occupy the entire field, whether assertedly medical or not. Therefore, the State's attempt to allow "medicinal" use of a Schedule I controlled substance under the CSA is fully preempted by the CSA.

Perhaps even more telling is the fact that marijuana remains in Schedule I under State law as well, indicating that the State also recognizes no medicinal use of marijuana. Cal. Health & Safety Code § 11054 (d)(3) & 11007; 62 Cal. Op. Atty. Gen. 65 (1979) (no use for controlled substances by physicians under the California Uniform Controlled Substances Act, Cal. Health & Safety Code § 11000, et seq.).

Fundamentally, there can be no property right in matter that is contraband under Federal and State law. A point of comparison is counterfeit money. Assuming there were some defense available to an individual who was found in possession of counterfeit money, there could be no claim that there was any legally cognizable property right in the material itself. Whether or not counterfeiting or possessing counterfeit United States bills were a crime under State law, an officer would be permitted to confiscate such bills and there would be no legal or common sense claim that the individual could make to the continued possession, property interest, or damage relating to such confiscation. The same is true of marijuana, which is contraband under both Federal and State law. And under State law, the *character* of marijuana has not changed; the only change that has occurred pursuant to the CUA and the MMPA is the limited defense to criminal *prosecution*. Marijuana remains, under both

State and Federal law, *contraband*, in which there can be no legally recognized property right.

V. PERMITTING RESPONDENT'S CIVIL SUIT TO GO FORWARD WOULD HAVE A SIGNIFICANT NEGATIVE IMPACT ON PUBLIC AGENCIES, INCLUDING LAW ENFORCEMENT AGENCIES, IN VIOLATION OF PUBLIC POLICY.

The import of the Trial Court's decision cannot be discounted. It raises serious concerns for public agencies, particularly law enforcement agencies.

First, after the Trial Court's opinion, law enforcement agencies are left with few options in terms of making in-the-field evaluations of recommendations from physicians relating to an individual's use, possession or cultivation of marijuana. According to the Trial Court's analysis, law enforcement officers must determine the validity of individual recommendations and the authenticity of allegedly collective or cooperative cultivation accurately or else be subject to liability. Moreover, such determinations must be made on an ad hoc basis and under circumstances not likely to be conducive to accurate determination. For instance, the CUA permits *oral* recommendations by physicians for the use of medical marijuana. Cal. Health & Safety Code § 11362.5 (d). The difficulty in an officer accurately verifying an oral recommendation on-the-spot is self-evident. Of course, this difficulty is inherent in the oral recommendation itself. However, the significant *change* that is permitted by the Trial Court's interpretation of the law would render an officer and/or his or her employing agency *liable* for the

destruction, as here, or damage to any marijuana due to a mistaken or incorrect determination by the officer as to the validity of an oral recommendation. This presents a significant expansion of the CUA and the MMPA, beyond the express provisions of law, not in compliance with the purpose behind these statutory provisions, and in contradiction of other express statutory provisions of both Federal and State law relating to marijuana, as discussed above.

Similarly, the difficulty in determining the validity of alleged cultivation by way of a "collective" or "cooperative" is equally, if not more, problematic. The facts in this case clearly demonstrate this dilemma. In fact, Respondent suggested in argument to the Trial Court that "collectives" are less formal than cooperatives, the latter being required to be *incorporated* under State law and the former impliedly subject to no governmental oversight or laws relating to corporate structure. (Petition for Writ of Mandate, Exhibit 5, at 56, ll. 3-6 *(citing* Cal. Corp. Code § 12311 (b)).

In fact, such a scheme would turn the CUA on its head. As discussed above, the CUA was never intended to require *officers* to evaluate the *affirmative defenses* which medical marijuana users may assert. This is why the protections afforded by the CUA and the MMPA were phrased as *exceptions* to the otherwise all-encompassing prohibitions against marijuana in the Health and Safety Code, and why the ballot materials for the adoption of the CUA emphasized that the CUA would not interfere with law enforcement officers' ability to make *any arrests* relating to marijuana violations, even of allegedly "medical" marijuana users.

By the Trial Court's interpretation, law enforcement officers would be saddled with the burden of immediately determining the validity of medical marijuana recommendations and/or cooperatives/ collectives, on pain of liability if they are mistaken or wrong, a burden that was always intended under the CUA and the MMPA to be on *prosecutors* or the *courts*. This would seriously hamper law enforcement officers' and agencies' ability to effectively and efficiently enforce the California Controlled Substances Acts, even against those who are flatly violating the laws and are not entitled to any medical marijuana defense.

For instance, an individual illegally cultivating marijuana could claim an oral recommendation by a physician. By the time the recommendation could be verified as false, evidence could be destroyed, responsible individuals could disappear, and, worse yet, the controlled substance itself could be secreted away to be entered into the illegal trade of controlled substances in violation of the purposes of both the Federal and California Controlled Substances Acts.

Second, this extreme interpretation of the MMPA and the CUA would seriously undermine officers' authority. Peace officers are held to a high moral standard and very often cooperate extensively with federal drug enforcement agencies or task forces. See, e.g., People v. Nord, 377 F. Supp. 2d 945 (2005) (local law enforcement officers acting on task force with federal Drug Enforcement Agency personnel). These roles are undermined by a rule of law that requires officers to make ad hoc, on-the-spot determinations, on pain of liability for any inaccuracy, as to marijuana which is at all times a violation of Federal law, and remains a violation of State law subject only to a

defense under the MMPA and the CUA. See, e.g., Bailey v. City of National City, 226 Cal. App. 3d 1319, 1328 (1991) ("the unique position occupied by police officers subjects them to an even higher standard of conduct than other employees"); Nicolini v. County of Tuolumne, 190 Cal. App. 3d 619, 630 (1987) (upholding termination of officer for "failure of good behavior either during or outside of duty hours which is of such nature that it causes discredit to the county").

The Trial Court's interpretation of the law as to medical marijuana would require officers to leniently evaluate marijuana they encounter, even if they are expected to uphold Federal legal standards as part of a task force with Federal agents, for instance, or be held liable for failing to do so, perhaps personally. The irony of such a position is undeniable and unenviable. Such a Hobson's Choice compromises the effectiveness and credibility of officers and their Department, since they are, generally, enforcers and administrators of the laws of the land, which include not just State laws, but Federal laws and the Federal Constitution.

This dilemma is made more poignant by the inherent requirement that law enforcement agencies, by the Trial Court's interpretation, must actually *protect* medical marijuana "property," even though it is contraband. For instance, if marijuana were confiscated from an individual, the person might, at any time, present a valid defense relating to the possession, use, cultivation, etc. of such marijuana. Therefore, law enforcement agencies would essentially be required, in *all* cases, to protect marijuana as "property." In order to avoid liability for the cost of such "property," assuming the value of such contraband could even be properly determined, law

enforcement agencies would now be required to *maintain and care* for *all* confiscated marijuana plants. Thus, law enforcement agencies might be required to *grow* marijuana and maintain the facilities for such growing. In addition, law enforcement agencies might be required to return confiscated marijuana plants to individuals from whom the plants were taken, thereby illegally *dispensing* a controlled substance in violation of Federal law.

Such a fundamental conflict in the law, both State and Federal law, in characterizing marijuana as "property" under the Trial Court's ruling undermines Departmental authority and morale. Appellant is faced with the dilemma of informing its officers which laws are to be followed and which are to be ignored with impunity. The Trial Court's determination requires the latter as to the Federal government's characterization of marijuana as a controlled substance without medical benefits and prohibited for any purpose, as well as to Federal laws prohibiting the cultivation and distribution of controlled substances and the return of "property" that is characterized under both Federal and State law as contraband.

In fact, the CUA makes no provision or requirement for the return of confiscated marijuana. See Chavez v. Superior Court, 123 Cal. App. 4th 104, 108 (2004) (denying writ of mandate and upholding trial court's refusal to return confiscated marijuana upon dismissal of criminal complaint, based upon Health & Safety Code provisions, the fact that destruction did not violate the Compassionate Use Act and that the court was without authority to return contraband). Therefore, a rule of law which would require law enforcement agencies to cultivate and/or

return marijuana to individuals affirmatively and impermissibly requires such agencies to "manufacture" and/or "distribute" marijuana, in direct violation of Federal law. 21 U.S.C. § 841 (a) (1) (unlawful for any person knowingly or intentionally to manufacture or distribute a controlled substance); 21 U.S.C. § 802 (11) ("distribute" means to deliver a controlled substance)[2]; 21 U.S.C. § 802 (15 & 22) ("manufacture" includes "production," which is also "planting, cultivation, growing, or harvesting of a controlled substance"). See also, 21 U.S.C. § 828 (a) ("It shall be unlawful for any person to distribute a controlled substance in schedule I or II to another except in pursuance of a written order of the person to whom such substance is distributed, made on a form to be issued by the Attorney General in blank in accordance with subsection (d) and regulations prescribed by him pursuant to this section."). Whether maintaining confiscated marijuana plants or returning confiscated marijuana to patients or caregivers, law enforcement officers and agencies would plainly be manufacturing and distributing marijuana in direct violation of Federal law.

The Trial Court's decision puts law enforcement agencies in the Catch-22 position of either having to purposefully violate potential patients' alleged "property" rights or having to directly violate Federal law by maintaining any such "property" pending a legal determination about whether there is a CUA or

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[2] Note that "dispensation" of controlled substances is also permitted, but includes only the delivery of controlled substances pursuant to the "lawful order" of a *practitioner*. 21 U.S.C. § 802 (10).

MMPA defense to State law marijuana prohibitions. As such, the Trial Court's rule of law cannot stand. Raich, 545 U.S. at 28 ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, *federal law* shall prevail.") (emphasis added).

Further, the "immunity" provided within the CSA does not apply or provide sufficient protection to law enforcement officers or agencies. Although there *is* immunity provided for law enforcement officers' contact with controlled substances as part of their duties, the immunities provided by the CSA are not broad enough to provide coverage under the circumstances of medical marijuana. The "immunity" provided to local officials is to those "'lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.'" 21 U.S.C. § 885 (d). However, the distribution or cultivation that would be necessarily required by the Trial Court's ruling would not constitute "enforcement" of a law relating to controlled substances. See United States v. Rosenthal, 454 F.3d 943, 948 (9th Cir. 2006) ("'[E]nforcement' means 'to compel compliance with the law . . . At best, Rosenthal was implementing or facilitating the purpose of the statute; he was not compelling anyone to do or not to do anything.").[3] As the District Court

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[3] In particular, any return of marijuana to a patient or caregiver could not be "enforcement" of California controlled substances laws, since the State's controlled substances statutes do *not* require the return of confiscated "medical" marijuana. *See* United States v. Rosenthal, 454 F.3d 943, 948 (9th Cir. 2006) (distinguishing State of Oregon v. Kama, 39 P.3d 866 (2002), based on fact that "state law *mandated* the return of marijuana to

noted in Rosenthal, and the Court of Appeal affirmed, for

> an official to be 'lawfully engaged' in the enforcement of a law relating to controlled substances, and therefore entitled to immunity, the law which the municipal official is 'enforcing' must itself be *consistent* with *federal law*. Chapter 8.42, to the extent it provides for the cultivation and distribution of medical marijuana, is *not lawful* under *federal or state* law.

United States v. Rosenthal, 266 F. Supp. 2d 1068, 1078 (D. Cal. 2003), *aff'd in pertinent part by* United States v. Rosenthal, 454 F.3d 943, 948 (9th Cir. 2006).

The District Court in Rosenthal specifically concluded that "'[l]awfully engaged' in 'enforcing a law related to controlled substances' must mean engaged in enforcing, that is, compelling compliance with, a law related to controlled substances which is *consistent*--or at least *not inconsistent*--with the Controlled Substances Act. Section 885(d) cannot reasonably be read to cover acting pursuant to a law which itself is in *conflict* with the Act." Id. (emphasis added) (noting that Congress determined that there are *no* medical benefits worthy of an exception prohibiting *any* possession, cultivation, distribution, transportation, etc. of marijuana, except as part of government-approved research).

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the individual from whom the marijuana had been seized") (emphasis added).

This immunity was designed to apply to direct enforcement actions and is not intended to apply to law enforcement *providing* contraband to criminal defendants, on a regular basis and not as part of an investigative effort to curtail drug trafficking, or to a law enforcement agency itself cultivating marijuana for the potential ultimate return of such substance directly to a user. See. e.g., United States v. Mustakeem, 759 F. Supp. 1172, 1176 (D. Pa. 1991) ("Undercover operations shall not include the furnishing of a controlled substance except in extraordinary cases after consultation with the appropriate United States Attorney").

The Trial Court's interpretation of the CUA and the MMPA, while some may say laudably furthering the protection of medical marijuana users' access, goes well beyond the specific purpose, intent and structure of these statutory provisions. Such an interpretation must be overturned, since it oversteps the bounds of the explicit statutory provisions and presents direct conflicts with both State and Federal law.

VI. CONCLUSION.

State law only recognizes a defense to criminal marijuana charges based on medical use. Notwithstanding the Compassionate Use Act and the Medical Marijuana Program Act, State law still characterizes marijuana as a Schedule I controlled substance, for which there are no medical uses and which is contraband, subject to seizure and forfeiture. Moreover, State law does not recognize any property interest in marijuana, medical or otherwise.

Furthermore, Federal law bans marijuana for any purpose, except sanctioned research projects. Federal law recognizes no property interest in marijuana; it is contraband. for all purposes. In fact, Federal law preempts State law in the area of Schedule I controlled substances.

However, State law and Federal law agree on the primary issue pertinent to this matter, namely that there is simply no property right in any marijuana; marijuana, whether for medical purposes or not, cannot be *legally* possessed or cultivated under either Federal or State law. If there can be no legally cognizable property interest in such substance, then it was improper for the Trial Court to have permitted Respondent's case to proceed beyond demurrer. Respondent will be unable to establish any rights for which compensation was or should be owed by Appellant under the causes of action alleged in Appellant's Fourth Amended Complaint.

Therefore, this Court is respectfully requested by Amici to issue a writ of mandate directing the Trial Court to grant the demurrer. The limited provisions of the Compassionate Use Act and the Medical Marijuana Program Act, Federal and State law, as well as common sense and public policy require no less.

Dated: June 4, 2008

Respectfully submitted,

JONES & MAYER

By: /s/Martin J. Mayer

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Krista MacNevin Jee,
Attorneys for Amici Curiae,
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CERTIFICATE OF COMPLIANCE

I, KRISTA MACNEVIN JEE, certify that the attached application and brief consist of 6,380 words, including footnotes. I have relied on the word count of the computer program used to prepare the brief.

Dated: June 4, 2008

JONES & MAYER

By: /s/ Krista MacNevin Jee
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Attorneys for Amici Curiae

* * *

[Proof of Service Omitted in Printing of the Appendix]

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No. 09-675

In The Supreme Court of the United States

COUNTY OF BUTTE, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF BUTTE COUNTY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Third Appellate District

BRIEF OF *AMICI CURIAE* FOR CALIFORNIA STATE SHERIFFS' ASSOCIATION, CALIFORNIA POLICE CHIEFS' ASSOCIATION, CALIFORNIA POLICE OFFICERS' ASSOCIATION, CITY OF COSTA MESA, AND CITY OF WHITTIER IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, which defines marijuana as contraband per se, preempt the decision from California's Third District Court of Appeal, which held that California law provides a protected property interest in marijuana that can form the basis for a civil action against law enforcement officers for money damages?

PARTIES TO THE PROCEEDING

The Petitioners are the County of Butte, California, the Butte County Sheriff's Department, and Butte County Sheriff's Deputy Jacob Hancock.

The Respondents are the Superior Court of Butte County, David Williams, and Does 1-4.

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI

Amici Curiae respectfully submit this *Amici Curiae* brief in support of Petitioners' Petition for Writ of Certiorari to urge the Court to grant such Petition. *Amici* are the California State Sheriffs' Association (CSSA), the California Police Chiefs' Association (CPCA), the California Peace Officers' Association (CPOA), the City of Costa Mesa and the City of Whittier. Counsel of Record's firm is the City Attorney, and authorized law officer, of the City *Amici*. No motion for leave to file the within *Amici Curiae* brief or disclosure of monetary contribution, therefore, are required pursuant to this Court's Rules. Sup. Ct. R. 37.4.[1]

CSSA represents each of the fifty-eight (58) elected California Sheriffs. CPCA represents virtually all of California's Municipal Chiefs of Police. CPOA represents more than four thousand peace officers, of all rank, throughout the State.

I. STATEMENT OF BASIS FOR JURISDICTION AND STATEMENT OF CASE

Amici Curiae adopt and incorporate by reference the statement by Petitioners of the basis for this

[1] Notwithstanding this, the Butte County Superior Court granted consent for this brief by *Amici* by order dated January 8, 2010.

Court's jurisdiction in this matter, as well as Petitioners' Statement of the Case. (*See* Petition for Writ of Certiorari at 1-12).

II. REASONS FOR ALLOWING WRIT OF CERTIORARI

In accordance with this Court's Rules, this Court may properly grant the Petition for Writ of Certiorari in this matter. The California Court of Appeal Opinion below recognizes property rights in medical marijuana in the State of California, which is in direct contradiction of federal law. Therefore, the granting of the Petition for Writ of Certiorari herein is necessary in order to settle important issues of federal law and to ensure that state law decisions do not conflict with decisions of this Court. Sup. Ct. R. 10(c).

Amici intend to briefly highlight, but not unduly repeat, important legal issues in this matter which are already included in the full text of the *Amici Curiae* brief previously submitted to the Court of Appeal and considered as part of its decision, which brief is included in the Appendix to the Petition for Writ of Certiorari. (*See* Petition for Writ of Certiorari, Appendix D).

III. INTRODUCTION

The California Court of Appeal in this matter has opined in a published opinion applicable throughout

the State of California that an individual possessing, cultivating, transporting or distributing marijuana for medical purposes, in compliance with California law, may maintain a cause of action against law enforcement agencies or officers because the individual can show that he or she legally was entitled to such marijuana. (*See* Petition for Writ of Certiorari, Appendix B at 11a (*County of Butte v. Superior Court*, 175 Cal. App. 4th 729, 736, 96 Cal. Rptr. 3d 421, 427 (2009))).

The Court agreed with a prior decision by another district of the California Court of Appeal in *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 68 Cal. Rptr. 3d 656 (2007), wherein the Court of Appeal had recognized that an individual can be "legally entitled to possess" medical marijuana. (Petition for Writ of Certiorari, Appendix B at 11a (*County of Butte*, at 736, 96 Cal. Rptr. 3d at 427 (*citing City of Garden Grove*, 157 Cal. App. 4th at 389))). Such conclusions are a direct affront to federal law.

IV. MARIJUANA IS CONTRABAND AND ILLEGAL UNDER BOTH STATE AND FEDERAL LAW.

This Court determined in *Gonzales v. Raich*, 545 U.S. 1, 26-7, 125 S. Ct. 2195, 2211, 162 L. Ed. 2d 1, 25 (2005), that the federal government, pursuant to the Controlled Substances Act ("CSA"), had determined that marijuana is "contraband for *any* purpose."

(emphasis in original). In fact, the CSA specifically permits States to *also* regulate controlled substances, but *only* to the extent that such regulations do not involve "a positive conflict" between a State's regulations and the CSA "so that the two cannot consistently stand together." 21 U.S.C. § 903.

This Court in *Gonzales v. Raich* has already established that there is precisely such a conflict between state laws that permit medicinal use of marijuana and federal laws, which prohibit *any* medical use and, in fact prohibit virtually *all* uses of marijuana.

As Justice Morrison rightly asserted in his dissent, "[c]ontraband *per se* consists of objects which are intrinsically illegal in character, the possession of which, without more, constitutes a crime. . . . Courts will not entertain a claim contesting the confiscation of contraband *per se* because one cannot have a property right in that which is not subject to legal possession." (Petition for Writ of Certiorari, Appendix B, at 22a-23a (*County of Butte v. Superior Court*, 175 Cal. App. 4th at 742, 96 Cal. Rptr. 3d at 432, *dissenting opinion* (*citing Cooper v. City of Greenwood, Miss.* 904 F.2d 302, 304-05 (5th Cir. 1990); *U.S. v. Harrell*, 530 F.3d 1051, 1057 (9th Cir. 2008)))).

Notably, even California law still recognizes that the possession, cultivation, and distribution of marijuana is a *crime*. The Compassionate Use Act (Cal. Health & Saf. Code § 11356.2, the "CUA") and the Medical Marijuana Program Act (Cal. Health &

Saf. Code §§ 11362.7-11362.83, the "MMPA") merely provide for a limited *defense* against prosecution of such crimes under certain circumstances. *See, e.g.*, Cal. Health & Saf. Code § 11362.765 (prohibiting criminal liability from being imposed for the possession, planting, harvesting, processing, transportation, and certain manufacturing and distribution of marijuana for medical purposes under specified circumstances); *Chavez v. Superior Court*, 123 Cal. App. 4th 104, 110, 20 Cal. Rptr. 3d 21, 25 (2004) (patient can "raise the medical use defense to set aside an information, indictment, or as a defense at trial"); *Ross v. Ragingwire Telecommunications*, 42 Cal. 4th at 923, 174 P.3d 200, 202, 70 Cal. Rptr. 3d 382, 385 (2008) (CUA provides a "defense to certain state criminal charges").

Therefore, under both California and federal law, marijuana cannot be "legally" possessed, and, as such there can be no enforceable property right in *any* marijuana. As recognized in the dissenting opinion, "the CUA did not give 'marijuana the same status as any legal prescription drug.'" (Petition for Writ of Certiorari, Appendix B, at 21a (*quoting Ross*, at 926, 174 P.3d at 204, 70 Cal. Rptr. 3d at 387)).

The dissenting opinion focuses on the very heart of the matter presented to this Court, namely that "[t]he marijuana was not 'legal' under state law, because California cannot make 'legal' that which Congress makes illegal." (Petition for Writ of Certiorari, Appendix B, at 21a (*County of Butte v. Superior Court*, 175 Cal. App. 4th at 742, 96 Cal. Rptr. 3d at

431, *dissenting opinion* (*citing City of Garden Grove*, 157 Cal. App. 4th at 377, 68 Cal. Rptr. 3d at 670))).

V. THE RECOGNITION BY CALIFORNIA OF A PROPERTY RIGHT IN MEDICAL MARIJUANA CONFLICTS WITH FEDERAL LAW AND PRIOR DECISIONS OF THIS COURT.

This Court has held that the CSA has a purpose of "control[ling] the *legitimate and* illegitimate traffic in controlled substances." *Gonzalez v. Raich*, 545 U.S. at 12, 125 S. Ct. at 2203, 162 L. Ed. 2d at 15 (emphasis added). In *Gonzalez v. Raich*, this Court noted that "Congress was particularly concerned with the need to prevent the *diversion* of drugs from legitimate to illicit channels." *Id.* (emphasis added). Therefore, the Court concluded that in enacting the CSA, "Congress devised a *closed* regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA." *Id.* (emphasis added).

It is this very "closed" regulatory system which has imposed a controlling and preemptive characterization as to the nature of marijuana. California State law cannot modify this characterization, even though it may be permitted to determine that State prosecutorial resources will not be used to combat certain uses of marijuana.

While this Court has not said that state refusal to criminalize or prosecute marijuana offenses is somehow contrary to federal law, the Court of Appeal's opinion in this matter goes well beyond mere inaction on the part of the State of California. The Court of Appeal's opinion in this matter affirmatively establishes a legally recognized, sanctioned and enforceable *right* to marijuana which cannot "consistently stand" with federal law.

Although not directly at issue on the facts in this matter, both the CUA and the MMPA fundamentally undermine the goals of the CSA as to the stated purposes and goals of the Act. 21 U.S.C. § 801. More specific to the issues in this matter, however, the Court of Appeal opinion creates a specific and irreconcilable conflict between state and federal law. In fact, the Court of Appeal's opinion below makes a flat mockery of federal law.

As set forth in the *Amicus Curiae* brief by *Amici* in the Court of Appeal below, which is included in the Appendix to the Petition for Writ of Certiorari, a close analogy exists as to the issues proposed by Respondent David Williams' complaint against the County of Butte with respect to marijuana and the nature of counterfeit money. (*See* Petition for Writ of Certiorari, Appendix D at 63a). No one would legitimately propose that an individual could retain a legally cognizable property right in counterfeit money, *even if* the State of California had legislatively determined that it did not want to, itself, pursue

prosecution as to such matters. The same is equally true of marijuana.

Items such as counterfeit money and marijuana are characterized as wholly illegally. Accordingly, allowing such materials to be recognized as "property," and returning such items to individuals allows such items to be in general circulation. These actions directly interfere with Congress' ability to regulate such materials, and to achieve its goal of eradicating the very existence of such materials or preventing the diversion of such materials to illegal usage.

As this Court has specifically recognized with respect to marijuana, Congress has already determined that there is *no* accepted or medical use of marijuana, and Congress has exercised its legitimate exclusive authority to regulate such matters by way of the CSA. *Gonzalez v. Raich*, at 28 ("the fact that marijuana – like virtually every other controlled substance regulated by the CSA – is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.").

A property interest simply cannot be recognized by State law, since Congress has definitely determined that *all* marijuana is contraband per se and there can be no property interest in such *illegal* substance. 21 U.S.C. §§ 881(a)(1) ("no property right shall exist" in controlled substances "manufactured, distributed, dispensed, or acquired in violation of" the CSA); 881(f)(1) (schedule I drugs, such as

marijuana, "deemed contraband")[2]; *Gonzalez v. Raich*, at 26-7 (marijuana is "contraband for any purpose").

Even the California Supreme Court has recognized that "[n]o state law could completely *legalize* marijuana for medical purposes because the drug remains illegal under federal law even for medical purposes." *Ross v. Ragingwire Telecommunications*, 42 Cal. 4th at 926, 174 P.3d at 204, 70 Cal. Rptr. 3d at 387 (2008) (emphasis added). The recognition of a California State property right is inimical to federal law.

VI. THE COURT OF APPEAL'S OPINION ENCOURAGES DISREGARD AND VIOLATION OF FEDERAL LAW AND INTERFERES WITH THE ABILITY OF STATE AND LOCAL GOVERNMENT TO ASSIST FEDERAL AUTHORITIES.

Most critical to this Court's consideration of this matter is the practical impact that the Court of Appeal's decision will have not only on law enforcement personnel and agencies, but on the general existence and proliferation of marijuana within and outside the State of California. As noted by Petitioner, state law enforcement officials take an oath to uphold

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[2] Notably, California law has not changed the characterization of marijuana as a Schedule I drug under the California Uniform Controlled Substances Act, for which there is no legally permitted use. Cal. Health & Saf. Code §§ 11054(d)(3) & 11007.

the Federal Constitution and federal laws and often jointly work with federal authorities on drug enforcement. (Petition for Writ of Certiorari, at 15-16). (*See also* Petition for Writ of Certiorari, Appendix at 18a-19a (*County of Butte v. Superior Court*, 175 Cal. App. 4th at 740-1, 96 Cal. Rptr. 3d at 430, *dissenting opinion*)). The Court of Appeal's opinion in this matter goes further than any other California court has previously done to actually coerce state and local law enforcement officials into *not* upholding, furthering or honoring federal law, upon threat of liability.

The Court of Appeal has put the backing of the entire State judicial system, the very force of law, behind medical marijuana growers, distributors and users; it is no longer merely a matter of the State of California *refraining* from prosecuting marijuana violators. For instance, if a local law enforcement officer were acting jointly with a federal task force to confiscate marijuana, such officer would have to be certain that no possible claim of medical marijuana entitlement could be made as to such marijuana, or else his or her agency, and even the officer him or herself *individually*, could be held liable for damages to such marijuana, or damages to its "owner" flowing therefrom, which could be caused by that officer – whether directly or indirectly, whether accidentally or

purposefully, or whether at the direction of federal authorities.[3]

Local law enforcement officers would be relegated to the mere shadows in such joint enforcement action, or else have to forego cooperating or assisting federal authorities altogether, in order to avoid the specter of liability which has now been created by the Court of Appeal. This hypothetical scenario only serves to emphasize the fact that the Court of Appeal's opinion in this matter directly inhibits the very goals and purposes Congress had in enacting the CSA, in regulating both the legitimate and illegitimate uses of all marijuana, for all purposes, in all states. *Gonzalez v. Raich*, 545 U.S. at 30, 125 S. Ct. at 2213, 162 L. Ed. 2d at 27 ("The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected. Indeed, that the California exemptions will have a significant impact on both the supply and demand sides of the market for marijuana is not just 'plausible' . . , it is readily apparent.").

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[3] The Court will note that, although the underlying complaint in this matter is not presently before the Court, Respondent David Williams has sought exemplary and punitive damages individually against Butte County Sheriff's Deputy, Jacob Hancock.

As the dissenting opinion recognizes, "[i]mposing civil liability for an officer who complies with federal law will lead to further confusion surrounding medical marijuana. Judges take the same oath, and the court should not encourage illegal acts." (Petition for Writ of Certiorari, Appendix at 19a (*County of Butte v. Superior Court*, 175 Cal. App. 4th at 741, 96 Cal. Rptr. 3d at 430, *dissenting opinion*)).

VII. THE COURT OF APPEAL'S RECOGNITION OF A PROPERTY RIGHT IN MEDICAL MARIJUANA DIRECTLY CONFLICTS WITH FEDERAL LAW.

The most basic problem with the recognition of a property right in medical marijuana is the fact that both the State of California, and Congress by the CSA, characterize marijuana as a Schedule I drug. There is, statutorily stated, no accepted medical use for marijuana, and virtually all private possession, cultivation, use and distribution is statutorily stated to be *illegal*. 21 U.S.C. § 812; Cal. Health & Saf. Code §§ 11054(d)(3) & 11007.

Simply, there can be no violation of rights, no compensation, no wrong associated with such an *illegal* substance. Furthermore, to allow the recognition of any such right interferes with and undermines the comprehensive federal authority which Congress has exercised in the enactment of the CSA. 21 U.S.C. § 801; *Gonzalez v. Raich*, at 12-13.

Moreover, to recognize a property right in such illegal, highly regulated material, is to open the door to recognizable property rights with respect to *all* regulated substances under the CSA. If states can grant rights in, and permit the use, possession, cultivation and distribution of, marijuana, there is no prohibition to the very same action being taken as to *any and all* schedule I drugs. Such possible action merely highlights the absurdity of the Court of Appeal's opinion in the face of federal law, and demonstrates the complete erosion of the CSA and Congress' authority which the Court of Appeal's opinion presents, if it is permitted to stand.

VIII. CONCLUSION.

Many of the issues implicated by the Court of Appeal opinion in this matter require the detailed analysis that only substantive briefs on the merits can adequately address. Suffice it to say that *Amici* feel that the impact of the Court of Appeal's opinion in this matter is of significant importance to the day-to-day activities of the law enforcement officers who are members of *Amici*, as well as the multitude of law enforcement officer employees over whom *Amici* members have supervisory authority.

In fact, the matters at issue herein are of nationwide importance. In particular, as the dissenting opinion noted, there are twelve other states with statutes permitting medical marijuana (*see* Petition for Writ of Certiorari, Appendix B, at 19a n.1 (*County*

of Butte v. Superior Court, 175 Cal. App. 4th at 740 n.1, 96 Cal. Rptr. 3d at 430 n.1, *dissenting opinion*)), and those states as well as others are likely looking to California as an example of how this experiment in a contradiction of federal and state law will conclude.

Thoughtful direction from this Court is most urgently needed on the issues presented. The Court of Appeal's opinion recognizes a property right in medical marijuana within the State of California, which permits growers, cultivators and distributors of medical marijuana within the State, to directly, publicly and with the backing of legal authority, flout federal law and the authority of Congress under the CSA.

The matters put in issue by the Court of Appeal opinion are of extreme importance to the scope, interpretation and enforcement of federal law. *Amici*, therefore, join Petitioners in emphatically requesting this Court to grant review in this matter, so that the parties, and *Amici*, may substantively address these

issues in more detail to the Court, and a resolution of the presented conflicts in law can be finally reached.

Respectfully submitted,

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